FOR ARGUMENT

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE APPELLEE

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GREAT WESTERN UNITED CORPORATION,

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On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The following statement supplements Appellants' statement of the case in order to correct inaccuracies and omissions therein.

The Tender Offeror and Target Company.

The tender offeror was Great Western United Corporation ("GWU"), a Delaware corporation, with its executive office in Dallas, Texas and controlled by residents of Dallas, Texas. GWU's securities are traded on the New York Stock Exchange and the Pacific Stock Exchange.

The target company was Sunshine Mining Company ("Sunshine"), a Washington corporation. The State of Washington had no state takeover statute. The common stock of Sunshine was listed and traded on the New York Stock Exchange (the "NYSE") and the Spokane Stock Exchange. The shareholders of Sunshine live throughout the United States; approximately 2.5% and 7% of Sunshine's shareholders resided in Idaho and Texas, respectively, during the relevant time period. (Pl. Ex. M-1, Pl. Ex. M-2, A. 35 to A. 36). Sunshine securities were not registered in Idaho.

At all relevant times, Sunshine had a corporate headquarters in Idaho and was engaged in the mining of silver through the operation of the Sunshine Mine in the Coeur d'Alene Mining District of Idaho. Sunshine was also engaged, through a subsidiary, Anchor Post Products, Inc., in the manufacture, sale and installation of coated steel, aluminum and wood fences, with a manufacturing facility in Baltimore, Maryland, and was also engaged in substantial business activities in the State of New York. (J.S. App., A-86).

On March 18, 1977, GWU purchased from Hecla Mining Company ("Hecla") and Silver Dollar Mining Company ("Silver Dollar") 335,070 shares (approximately 6%) of the stock of Sunshine. (J.S. App., A-87). In December 1976, Hecla and Silver Dollar had underwritten an unsuccessful proxy contest to oust Sunshine's management. GWU agreed that if it successfully gained control of Sunshine, subject to approval by Sunshine shareholders GWU would reimburse Hecla and Silver Dollar up to $200,000 for their proxy fight expenses. (A. 43 to A. 44).

On March 21, 1977, GWU announced its intention to make an interstate cash tender offer to purchase up to 2,000,000 shares of common stock of Sunshine for $15.75 per share. This price represented a premium over the recent pricing

history of Sunshine stock on the NYSE. (Pl. Ex. M-4, A. 55 to A. 56). Because the proposed tender offer was national in scope, and because the means and instrumentalities of interstate commerce were necessarily to be involved in the making of the proposed tender offer, GWU was required to comply with the provisions of the Securities Exchange Act of 1934 (the "1934 Act") governing corporate cash tender offers. 15 U.S.C. §§ 78l(i), 78m(d)-(e), 78n(d)-(f) (1970).

Proceedings Under the Williams Act.

Pursuant to the Williams Act amendments to the 1934 Act, and the rules promulgated thereunder, GWU was required to file and did file with the Securities & Exchange Commission (the "SEC") a Schedule 13D (currently Schedule 14D-1) containing specified information. That information included GWU's identity and background, the amount and source of the funds to be used to purchase Sunshine stock, the purpose of the transaction, any plans for liquidation, merger or other significant changes in business or corporate structure of Sunshine, the number of shares of Sunshine owned by GWU, and the details of any agreements with other parties concerning Sunshine shares.

Moreover Section 14(d) of the 1934 Act and the rules promulgated thereunder required the proposed interstate cash tender offer to be conducted in accordance with the substantive provisions of the Williams Act relating to withdrawal rights of shareholders within 7 days after the offer is made and after 60 days from the making of the offer and prorata purchases of shares in partial offers, and requiring that any increase in the offer price be paid to all tendering shareholders. GWU was further required to conduct the tender offer in compliance with the antifraud provisions of Section 14(e) of the 1934 Act.

But for the obstacles imposed by the state takeover statutes hereinafter described, GWU, in accordance with the regulatory scheme adopted by Congress, and administered by the SEC, could have commenced its interstate cash tender offer for stock of Sunshine on March 21, 1977, and shortly thereafter Sunshine shareholders could have commenced tendering their shares for cash.

On April 1, 1977, Sunshine instituted suit against GWU in the United States District Court for the District of Idaho, alleging deficiencies in the Schedule 13D filed pursuant to the Williams Act, but on April 22, 1977, that court held that GWU was in compliance with the requirements of the Williams Act, and denied the injunctive relief sought by Sunshine against the proposed interstate cash tender offer. *Sunshine Mining Co. v. Great Western Corp.*, (1977-78 Transfer Binder) FED. SEC. L. REP. (CCH) ¶ 96,049.[1]

Concurrent Proceedings in Idaho.

Approximately seven years after the adoption of the Williams Act, the State of Idaho enacted a corporate takeover law, IDAHO CODE §§ 30-1501 to 30-1511 (the "Idaho Act"), which became effective July 1, 1975. The Idaho Act

[1] That litigation was dismissed as a result of settlement between the parties on October 5, 1977. The settlement provided that GWU or its parent, Hunt International Resources Corporation ("HIRCO"), would pay $15.00 per share for tendered shares and, within 18 months, offer $15.00 per share for Sunshine shares not purchased in the tender offer. (J.S. App., A-10). Litigation was commenced by GWU and HIRCO against Sunshine in Texas and by Sunshine against GWU and HIRCO in Idaho over the terms of the settlement agreement. Moreover, HIRCO, on February 26, 1979, commenced a cash tender offer for the remaining Sunshine shares at $15.00 per share. Sunshine sought to enjoin the offer in New York for alleged disclosure deficiencies under the Williams Act. Sunshine also sought to enjoin the offer in Maryland for failure to comply with the Maryland Corporate Take-over Law, MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to 908 (Cum. Supp. 1976), (the "Maryland Act"), and HIRCO sought to declare the Maryland Act unconstitutional. Wall St. J., March 13, 1979, at 28, col. 4. The offer was ultimately withdrawn by HIRCO on March 26, 1979.

provides, *inter alia*, that no tender offer may be made for a target company which is not made to all Idaho stockholders or which is not made to Idaho stockholders on substantially the same terms as the offer is made to stockholders outside of Idaho. Idaho Act, § 30-1506. Section 30-1501(6) of the Idaho Act defines a target company as a corporation which is organized in Idaho, or has its principal office in Idaho, or has substantial assets in Idaho, and whose equity securities are or have been registered under Idaho law or Section 12 of the 1934 Act.

Significantly, the presence or absence of target company shareholders in Idaho is irrelevant to the applicability of the Idaho Act.

Although Sunshine was not incorporated in Idaho, had relatively few shareholders in Idaho, and had not registered its securities with the State of Idaho, GWU was compelled to consider compliance with the Idaho Act because Sunshine's securities were registered with the SEC pursuant to Section 12 of the 1934 Act and because Sunshine had its corporate headquarters in Idaho and was engaged in the mining of silver through the operation of the Sunshine Mine in the Coeur d'Alene Mining District of Idaho.[2]

Before GWU could go forward with its interstate cash tender offer, the Idaho Act required GWU, among other things:

(a) To submit to the Idaho Director of the Department of Finance a pre-effective filing disclosing GWU's intention

[2] The Idaho Act provides for a fine of not more than $5,000 or imprisonment for not more than three years or both for each wilful violation of the Idaho Act or any rule thereunder. § 30-1510. In view of the extraterritorial reach of the Idaho Act, § 30-1506, GWU could not make the cash tender offer available to Sunshine shareholders anywhere in the world without risking fines, or imprisonment of its executives, or both.

to make a tender offer and the terms of that offer, §§ 30-1503(1)-(2);

(b) To transmit, at the same time, a copy of that filing to Sunshine, § 30-1503(1);

(c) To publish an advertisement describing the intention to make the offer and the proposed material terms, § 30-1503(1) and Definitions of the Rules and Regulations for Chapter 15 of the Idaho Statutes, The Idaho Corporate Take-over Law, ¶ 6, 1A BLUE SKY L. REP. (CCH) ¶ 15,721;

(d) To pay the Idaho registration fee, § 30-1508 (the fees range from $500 to $5,500);

(e) To participate in a hearing, which would be mandatory if Sunshine requested one, § 30-1503(4); and

(f) To delay its proposed interstate cash tender offer until made effective by the Idaho Director, § 30-1503(1) and (4), and until the final determination of any administrative or injunctive proceeding brought by the Director of the Department of Finance for violation of the Idaho Act, § 30-1506(5).

No time limitation is placed on when the Director must rule on the effectiveness of the registration statement, and, in fact, there is no statutory requirement that he rule at all; a takeover offer simply becomes effective when approved by the Director. Any hearing called by the Director (on his own or at the request of Sunshine) is to be held within 20 days of the filing of the registration statement. Idaho Act, § 30-1503(5). If a hearing is called by the Director on his own initiative or at the request of the target company, the offer does not become effective until registered by order of the Director, and the Director has unlimited right to extend any determination made following a hearing for the convenience of the parties or for the protection of offerees in Idaho. Idaho Act, § 30-1503(4)-(5). The Director is also

authorized by order to summarily delay the effective date of the offer if he determines that the registration statement is insufficient. Idaho Act, § 30-1503(3).

GWU's offer would not have been subject to any requirements under the Idaho Act if the terms had been accepted by Sunshine's Board of Directors and if the offer was made to all stockholders on substantially equal terms. Idaho Act, § 30-1501(5)(e).

At the outset, GWU attempted to comply with the requirements of the Idaho Act.

Prior to the March 21, 1977 announcement of the proposed tender offer, GWU obtained assurances from Melvin J. Baptie, Idaho's Deputy Administrator-Securities of the Department of Finance, that the disclosure requirements in Idaho would be substantially met through the filing of GWU's Schedule 13D. The Idaho Act, pursuant to § 30-1502(2), specifically authorizes informational filings pursuant to the 1934 Act in lieu of the information requirements of § 30-1502(1). The Idaho Act does provide for the filing of additional information, but grants to the Director the discretion to permit the omission of any such additional information if he determines that such information is not required for the protection of offerees. Idaho Act, § 30-1503(1), (2) and (3).

Based upon these assurances, and notwithstanding the belief held by GWU that the Idaho Act was unconstitutional, GWU, in a spirit of cooperation, attempted to comply with the Idaho Act by filing thereunder a registration statement consisting of the Schedule 13D filed with the SEC. (May 23, 1977 Trial Tr., pp. 140, 142-145, Testimony of G. Michael Boswell, Executive Vice President of GWU).

On March 25, 1977, Mr. Baptie transmitted to GWU's counsel in Texas, at his request, a comment letter seeking

substantial additional information from GWU over and above what was contained in the Schedule 13D and advising that should GWU decide not to file the requested information, the Idaho Director was prepared to call for a hearing on his own initiative and determine whether or not the March 21, 1977 filing contained sufficient disclosure. (A. 77 to A. 85). Accompanying this transmission was an Order summarily issued by Appellant McEldowney (without notice, hearing or the posting of any bond or other security) which, as determined by both courts below, effectively enjoined GWU's proposed interstate cash tender offer, not only in Idaho but in every state, for more than five months. (Pl. Ex. 4 and Pl. Ex. 5, A. 86 to A. 87, J.S. App., A-18, A-105). On the preceding day, counsel for GWU had been advised that there would be no room for negotiation with the Idaho officials and that GWU's only alternatives would be to comply fully with the Idaho letter or be subjected to a hearing in Idaho. (A. 289 to A. 292, Testimony of Steven C. Metzger, counsel for GWU; Pl. Ex. M-8, A. 76, Handwritten Notes of Steven C. Metzger).

This non-negotiable stance of the Idaho officials, confirmed in the final paragraph of the Idaho letter (A. 85), would have caused immediate, predictable and adverse consequences to GWU if it had continued to attempt to comply with the Idaho Act, including:

(a) The Idaho Director took the position that the registration statement filed March 21, 1977 was not complete, so that the 20-day time period for the calling of a hearing would not even begin to run until all of the additional information had been received and accepted as complete. (A. 85).

(b) The Idaho Director took the view that reimbursement of the $200,000 by GWU to Hecla and Silver Dollar for their

proxy fight expenses may have violated § 30-1505(2) of the Idaho Act, which forbids any offeror from engaging in any fraudulent, deceptive or manipulative acts or practices in connection with a takeover offer, including a sale by a controlling stockholder of a target company at a price higher than that paid other stockholders pursuant to a tender offer. (A. 84). In a telephone conversation with Mr. Baptie, GWU counsel was advised that the $200,000 arrangement "looked to be a pretty clear violation of that section of the statute which would have the effect of Great Western never really being able to get their registration statement effective."[3] (A. 290, Testimony of Steven Metzger).

(c) The Idaho letter further required a more definitive disclosure of any possible effect on Sunshine of GWU's preliminary proxy material which had been filed under confidential treatment with the SEC relating to a proposed plan of recapitalization. (A. 81). GWU recognized that disclosure in the tender offer of the effect on Sunshine of the plan of reorganization could be considered to be "gun-jumping" under the Securities Act of 1933 (the "1933 Act") and could in and of itself violate the Williams Act.[4] (A. 236, Testimony of G. Michael Boswell).

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[3] The United States District Judge for the District of Idaho found that the legality of the reimbursement of the proxy contest expenses up to $200,000 was not a matter which would lead to an injunction against a tender offer, and that Sunshine had a past practice of reimbursing participants in proxy contests for their expenses in similar situations. (Pl. Ex. M-3, A. 43 to A. 44).

[4] GWU's plan of reorganization involved, in fact, the elimination of preferred stock by the issuance of interest-bearing notes of equivalent value, as set forth in the litigation papers and the Vice-Chancellor's letter opinion dated September 19, 1977, in *Lewis and Betty Rubin v. Great Western United Corporation, et al*, C.A. 5397 (Ch. Del. August 29, 1977). The possible effect thereof on Sunshine would necessarily include the disclosure of a pro forma GWU balance sheet setting forth the estimated value of the notes to be issued in exchange for preferred stock.

(Footnote continued on following page)

(d) The Idaho letter also sought information on GWU's future plans for investigating and evaluating Sunshine's mining and other operations (A. 79) and on the impact a merger or disposition of some or all of Sunshine's subsidiaries and divisions would have on Sunshine and those stockholders who did not tender their shares. (A. 83). GWU's Schedule 13D had disclosed that, among other things, GWU intended to further investigate and evaluate Sunshine's mining and other operations upon consummation of the offer (A. 79), and that GWU would consider whether to seek to acquire all or a portion of the remaining Sunshine shares through various means, or whether to propose a merger or similar combination, depending upon a variety of factors, such as the number of shares purchased in the proposed tender offer, or otherwise, market conditions, asset values and earnings. No assurance was given that any such transaction would be consummated. (A. 45 to A. 46).

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[4] (Continued)

Section 5(c) of the 1933 Act, 15 U.S.C. § 77e(c), prohibits the making of offers of a security prior to the filing of a registration statement. The SEC and the courts have construed such prohibited offers very broadly to include any pre-filing publicity which arouses public interest or conditions the market to be more receptive to the issue, such as disclosure of the value of securities to be offered. *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970); *SEC v. Arvida Corp.*, 169 F.Supp. 211 (S.D.N.Y. 1958); SEC Release No. 33-3844 (October 8, 1957), 1 FED. SEC. L. REP. (CCH) ¶ 3250; Bloomenthal, 3A *Securities and Federal Corporate Law* § 6.09 (1978). GWU's plan of recapitalization was governed by SEC Rule 145, which applies to securities issued in certain types of corporate transactions. Rule 145(b) provides that certain specified limited information may be published prior to the filing of the registration statement, which information does not allow disclosure of the value of securities to be offered. This limited information is analogous to that permitted by a parallel rule, Rule 135, which applies to other types of public offerings. Rule 135 has been held to be exclusive and thereby to specify the only information which may be published prior to filing the registration statement. *Chris-Craft Industries, Inc. v. Bangor Punta Corp., supra*, at 573-76.

GWU was fearful that compliance with the Idaho letter, by premature disclosure of future plans and the effects of a preliminary merger plan, would itself violate the Williams Act. (A. 242, Testimony of G. Michael Boswell).[5]

(e) The Idaho letter further sought substantial additional information about GWU, including a description of each class of its capital stock and long-term debt,[6] a description of the location and character of the principal properties of GWU and its subsidiaries (A. 80), and disclosure of how GWU expected to repay the $35,000,000 commitment to finance the proposed tender offer. (A. 82). These financial

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[5] The United States District Judge for the District of Idaho determined that GWU's Schedule 13D accurately and completely set forth and described GWU's plans concerning a merger or other combination with Sunshine and all material information relating thereto, that no further disclosure concerning the effects of a merger need be made, and that a tender offeror is not required to make predictions of future behavior which may cause the offeree or the public investor to rely upon them unjustifiably. (A 48, A. 49 and A. 53).

Numerous other courts have recognized that in making disclosures in a tender offer, the offeror should not be called upon to predict the future with respect to its plans for the target. *Susquehanna Corp. v. Pan American Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970); *Copperweld Corp. v. Imetal*, 403 F.Supp. 579 (W.D.Pa. 1975); *Alaska Interstate Co. v. McMillian*, 402 F.Supp. 532 (D. Del. 1975).

It is also settled that it would be as serious a contravention of the federal securities laws to overstate the definiteness of future intentions with respect to merger as to understate them. *Susquehanna Corp. v. Pan American Sulphur Co., supra; Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969); *Spielman v. General Host Corp.*, 402 F.Supp. 190 (S.D.N.Y. 1975), *aff'd.*, 538 F.2d 39 (2d Cir. 1976); *Nicholson File Co. v. H. K. Porter Co.*, 341 F.Supp. 508 (D. R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973).

[6] The United States District Court for the District of Idaho found that GWU's financial condition was fully described in its public filings (A. 48) and held that under the Williams Act public companies need not disclose financial information about themselves otherwise publicly available to the shareholders. (A. 53). Other courts have arrived at the same conclusion. *Alaska Interstate Co. v. McMillian*, 402 F. Supp. 532 (D. Del. 1975); *Interstate Brands Corp. v. DPF, Inc.*, 75 Civ. 417-W-4 (W.D. Mo. June 23, 1975).

inquiries as to capitalization, principal properties and projections were considered by GWU management to be irrelevant in the context of a cash tender offer, and included subjective materials and a request for items far more properly includable in a registration statement that would be utilized for the sale of a security (A. 235 to A. 236, Testimony of G. Michael Boswell), causing GWU to reach a determination that it might not ever be able to adequately respond to the Idaho letter. (May 23, 1977 Trial Tr., p. 156, Testimony of G. Michael Boswell).

(f) GWU was informed by the Idaho officials that they did not have the proper staff or the proper expertise to hold the hearing and would go outside the State of Idaho in order to find an expert who would act as the hearing officer. The Indiana Securities Commissioner was mentioned as a potential expert, but a definite date could not be given when a hearing would be called because the availability of any hearing officer was not known. Idaho officials also could not tell GWU how long the hearing might take, or how long it would take the hearing officer, once chosen, to render a decision. The resulting delay would materially decrease the likelihood of a successful tender offer because the management of the target company would have many tactical solutions available, including a friendly merger, the sale of attractive assets, the issuance of shares for the creation of antitrust implications and the opportunity to find a suitor who would raise the bid. (May 24, 1977 Trial Tr., p. 190, Testimony of G. Michael Boswell). During the period of delay, GWU would also be facing the expense of counsel fees and expenses for hearings during a lengthy and indeterminate period of time (May 24, 1977 Trial Tr., p. 192, Testimony of G. Michael Boswell), and GWU's funds for the tender offer would be frozen while the prevailing interest

rates continued to be charged on borrowed funds and the costs of capital incurred on internally available funds continued to increase. (A. 139 to A. 140, Testimony of John S. Guest, Managing Director and Treasurer of Kuhn, Loeb & Company).

(g) GWU recognized problems created by the advance disclosure and publication requirement of the Idaho Act, § 30-1503, in light of the fact that the New York Security Takeover Disclosure Act (N.Y. Bus. Corp. Law § 1600, *et seq.*) (the "New York Act") would apparently prohibit such advance disclosure and publication by requiring all proposed materials to be filed 20 days in advance with the Attorney General of New York. New York Act, §§ 1602 and 1603(a)(1). GWU had determined that the local papers in Boise, Idaho, which would carry the advance publication required under the Idaho Act had subscribers who were residents of New York, which could result in compliance with one statute leading to a violation of the other. (A. 235, Testimony of G. Michael Boswell).

(h) The Idaho position was reiterated that any tender made by GWU outside of Idaho without the offer being effective in Idaho would be unlawful under the Idaho Act. (A. 80).

Other Concurrent State Proceedings.

More than eight years after the adoption of the Williams Act, the State of New York enacted the New York Act, which became effective November 1, 1976, together with Codes, Rules and Regulations adopted thereunder, 2 Blue Sky L. Rep. (CCH) ¶ 35,663, and the State of Maryland adopted the Maryland Act, Md. Corp. & Ass'ns Code Ann. §§ 11-901 to 11-908 (Cum. Supp. 1976), which became effective July 1, 1976.

In similar fashion to the Idaho Act (§ 30-1506), the New York administrative rules require a takeover bid to be made by an offeror to all shareholders and on the same terms, § 12.4(f), and the Maryland Act forbids a takeover offer which is not made to all target company stockholders in Maryland and on substantially the same terms as the offer is made to stockholders outside Maryland. § 11-905(a)(1)-(2).

The New York Act applies to a takeover bid for the equity securities of a corporation organized in New York or having its principal place of business *and* substantial assets within New York, § 1601(a), whereas the Maryland Act applies to an offer for the securities of a corporation either organized in Maryland or having its principal place of business *or* a substantial portion of its assets in Maryland. § 11-901(i)(1)-(2).

Significantly, the presence or absence of Sunshine shareholders in New York or Maryland was irrelevant to the applicability of either statute.

Sunshine was not incorporated in New York or Maryland. Of Sunshine's 18,434 shareholders, 2,559 (approximately 13.9%) were brokers or individuals in New York. New York brokers held 1,839,531 (approximately 32%) of Sunshine's shares. New York individuals held 381,916 (approximately 6.6%) of Sunshine's shares. Of Sunshine's 18,434 shareholders, 370 (approximately 2%) were brokers or individuals in Maryland, holding a total of 84,663 (approximately 1.5%) of Sunshine's total outstanding shares. (A. 35 to A. 36).

GWU was confronted with the potential need to comply with the New York Act and the Maryland Act (as well as

the Idaho Act) because of Sunshine's business activities in New York and the assets of its subsidiary in Maryland.[7]

If applicable, the New York Act would have required GWU, among other things:

(a) To submit to the Attorney General of New York a pre-effective filing at least 20 days prior to making a takeover bid (§ 1602) containing the information prescribed in § 1603, which includes copies of all prospectuses, etc. by means of which GWU would have made the offer and the terms of that offer (§ 1603(a)1); a description of each class of GWU's capital stock and of its long-term debt, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the business done and projected by GWU and its subsidiaries and the general development of such business over the past five years (§ 1603(a)7); and such other and further documents, exhibits, data and information as may be required by the Attorney General (§ 1603(a)8);

(b) To transmit, at the same time, a copy of that registration statement to Sunshine (§ 1602);

(c) To pay the New York registration fee (the fees range from $1,000 to $2,500) (§ 1608(b));

(d) To participate in a hearing which may be called by the Attorney General within 15 days and to commence within 40 days of the filing of the registration statement (§ 1604);

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[7] Wilful violation of the New York Act subjects the offeror to both civil and criminal penalties. §§ 1606(a) and 1607(a)-(b). Violation of the Maryland Act subjects the offeror to civil remedies, § 11-906, and a wilful violation subjects the offeror to criminal penalties consisting of a fine not exceeding $5,000 or imprisonment not exceeding three years, or both. Maryland Act, § 11-906, referencing § 11-705, 1A BLUE SKY L. REP. (CCH) ¶ 23,385.

(e) In the event the Attorney General shall schedule a hearing or conduct an investigation, to comply with the mandatory order prohibiting the making of the takeover bid (§ 1605(a)); and

(f) To delay the proposed tender offer until conclusion of the hearing or investigation and the issuance of a favorable order by the Attorney General (§ 1605(b)).

No time limitation is placed on when the Attorney General must rule on whether the requirements of the New York Act have been met, and, in fact, there is no statutory requirement that he rule at all.

Prior to the announcement of the proposed tender offer on March 21, 1977, special counsel in New York submitted a memorandum to the Attorney General in New York which argued that he had no jurisdiction under the New York Act. On March 24, 1977, the Office of the Attorney General stated that it had either concluded or believed that there was jurisdiction under the New York Act and recommended that GWU file a registration statement as soon as possible. (A. 116 to A. 119, Testimony of Milton Strom, New York counsel for GWU).

If applicable, the Maryland Act would have required GWU, among other things:

(a) To submit with the Maryland Commissioner a pre-effective filing at least 20 days prior to the dates on which the offer is made and copies are first published or sent or given to security holders, disclosing GWU's intention to make a tender offer and the terms of that offer (§ 11-902);

(b) To transmit, at the same time, a copy of that pre-effective filing to Sunshine (§ 11-902);

(c) To pay the Maryland registration fee of $100.00 (§ 11-902);

(d) To file with the Commissioner and send to Sunshine copies of all advertisements, circulars, letters or other material published by GWU soliciting or requesting the acceptance or rejection of the offer, not later than the time copies of such solicitation materials are first published, used or sent to security holders of Sunshine (§ 11-903); and

(e) As developed here, to participate in a hearing to determine whether the Maryland Commissioner had jurisdiction.

On March 21, 1977, counsel for GWU and counsel for Sunshine met with the Maryland Commissioner expressing their contrary views on the question of jurisdiction under the Maryland Act over GWU's proposed interstate cash tender offer. Both parties presented a written submission. The sole question in Maryland revolved around whether the assets of Sunshine's subsidiary, Anchor Post Products, Inc., constituted a substantial portion of Sunshine's assets. (March 30, 1977 Trial Tr., pp. 68-72, Statement by Dickee Howard Goodman, Assistant Attorney General of Maryland). Subsequently, the Maryland Commissioner advised counsel for GWU that it would be necessary to have a hearing to determine whether the Maryland Act was applicable to GWU's proposed tender offer. (J.S. App., A-89).

As was also the case in Idaho, GWU's offer would not have been subject to any requirements under either the New York Act or the Maryland Act if the terms had been accepted by Sunshine's Board of Directors and if Sunshine's shareholders had been informed as to any inducements to Sunshine's officers or directors (New York Act, § 1601(b)(5); Maryland Act, § 11-901(h)(2)(v)).

Sunshine's Board of Directors did not approve GWU's proposed tender offer terms,[8] and on March 20, 1977, authorized the retention of Wertheim & Co., Inc. ("WCI") to provide financial consulting and other services in connection with such proposed tender offer, including the responsibility to actively solicit competing tenders or other offers if considered by WCI to be warranted. On March 30, 1977, Sunshine and WCI entered into an agreement, whereunder WCI received a nonrefundable $200,000 retainer, plus additional fees if GWU's proposed offer failed and there was no other offer for Sunshine, or in the event of a third-party transaction or a merger between Sunshine and GWU, even if WCI provided no additional services. (Pl. Ex. M-5, A. 64 to A. 73).[9]

At this point, therefore, GWU was faced with the problem of meeting the requirements of three different state takeover statutes, each containing provisions differing from, if not conflicting with, each other as well as provisions in conflict with the administration of the federal program for the regulation of tender offers.

Compliance with the Idaho Act would have required GWU to attempt to add the additional information sought by the Idaho officials, to wait for the Idaho hearing (which the Director had to call at the request of Sunshine), to wait for

[8] GWU's initial offer was $16.75 per share if Sunshine's management would accept the offer. Sunshine's Board of Directors refused such acceptance, under the time constraints placed upon it. (J.S. App., A-87, n.3).

[9] GWU subsequently sued derivatively on behalf of Sunshine to declare, *inter alia*, any claims by WCI for such additional fees unenforceable on various grounds, including waste of corporate assets. There has been no complete resolution of this litigation. *Great Western United Corp. v. Sunshine Mining Co., et al*, 77 Civ. 4500 (S.D.N.Y. Sept. 12, 1977). The unusual provisions for additional fees in the Sunshine-WCI agreement are commented on in 1 M. Lipton and E. Steinberger, *Takeovers and Freezeouts*, 405 (1978).

and to comply with the orders to be issued thereafter and to await the conclusion of any judicial review procedures thereafter. Compliance with the Maryland Act would have required GWU to participate in a hearing on the applicability of the Maryland Act, to wait for a decision by the Maryland Commissioner and to comply with any orders which might be issued and to await the outcome of any judicial review procedures. Compliance with the New York Act would have required GWU to file the registration statement with the New York Attorney General and to await the outcome of any hearings and to comply with any orders issued as a result thereof, and to await the outcome of any judicial review procedures thereafter.

Litigation Instituted by GWU.

On March 28, 1977, GWU filed suit in the Northern District of Texas against the state officials responsible for enforcing the Idaho, New York and Maryland takeover laws.[10] The suit sought an order declaring that the Idaho, New York and Maryland Takeover Acts were invalid insofar as they purported to apply to an interstate cash tender offer for the purchase of securities traded on a national securities exchange. At the temporary restraining hearing on April 1, 1977, counsel for the Idaho and Maryland officials were in attendance and admitted that their respective state takeover statutes were applied extraterritorially. (A. 106 to A. 109 Statements by Peter R. Heiser, Jr. and Dickee Howard Goodman). Counsel for the Idaho defendants further recognized that the action taken by the issuance of the Idaho let-

[10] GWU sued both Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Idaho Department of Finance, because they have concurrent jurisdiction under the Idaho Act to bring an enforcement action. (A. 104 to A. 105, Statement by Peter E. Heiser, Jr., Deputy Attorney General of Idaho.)

ter and Order under Idaho law affected GWU in Dallas, Texas.[11] (A. 107 Statement by Peter E. Heiser, Jr.).

Following a jurisdiction and venue hearing and a trial on the merits, only Appellant McEldowney filed an appeal of the District Court decision with the Fifth Circuit. The only party Appellant in this case before the United States Court of Appeals for the Fifth Circuit was Tom D. McEldowney. Since Wayne L. Kidwell was not a party to the proceeding in the Court from whose judgment this appeal is sought, he is not a proper party to any proceedings before this Court. U. S. Supreme Court Rule 10. GWU timely filed with this Court its Motion to Dismiss Wayne L. Kidwell (now David H. Leroy) as a party Appellant.

The Fifth Circuit decision unanimously affirmed the District Court on all issues other than jurisdiction; a majority of the Fifth Circuit affirmed the District Court on the issue of jurisdiction, over the dissent of Judge Godbold.

SUMMARY OF ARGUMENT

I.

THE IDAHO TAKEOVER STATUTE APPLIES EXTRATERRITORIALLY

Unlike any other state statutes, the Idaho Act *intentionally* affected and even prohibited interstate commerce among, and intrastate commerce within, other states. The officials of Idaho gave extraterritorial effect to the Idaho Act by forbidding GWU from making any offer to any resident of any state without first complying with its law, irrespective of the presence of any target company shareholders in Idaho. Idaho may not refuse to recognize the territorial limits of

[11] The effect of the action of the Idaho officials was characterized by the Fifth Circuit as stopping over 31 million dollars of interstate commerce. *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1284 (1978).

its legislative authority. The questions posed by the old English case of *Buchanan v. Rucker*, 130 Eng. Rep. 546, 547 (K.B. 1808) must be asked once again. "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"

It is no answer for Idaho to state that extraterritorial application of its laws was necessary to avoid discrimination against Idaho shareholders. That very statement proves the point — the Idaho Legislature has purposely sought to legislate for the entire nation by attempting to govern all of the extraterritorial aspects of a cash tender offer for securities traded in the national marketplace. It is also no answer for Appellants to rely upon the general proposition that the general corporate law of a state affects shareholders outside the state. The target company was not organized under the law of Idaho, but rather under the law of Washington, whose general corporate law would apply. It is further no answer for Appellants to rely upon state securities regulation under state Blue Sky laws because the constitutionality of such state regulation is expressly conditioned upon intrastate application.

II.

THIS SUIT IS NOT BARRED BY THE ELEVENTH AMENDENT

Under the landmark decision of *Ex Parte Young*, 209 U.S. 123 (1908), this suit to declare the Idaho Act unconstitutional and preempted under well-established constitutional principles is not a suit against the State of Idaho. It is an action against state officials in their individual capacities and, therefore, is not barred by the Eleventh Amendment. This Court has consistently upheld *Ex Parte Young*, and has recently applied the doctrine to support the imposition of attorney's fees against state officials where

such relief is necessary to enforce prospective injunctive relief. *Hutto v. Finney*, ... U.S. ....., 98 S.Ct. 2565 (1978). Once sovereign immunity is removed by application of the *Ex Parte Young* doctrine, the state official is subject to the jurisdiction of those courts which have personal jurisdiction over him by virtue of the application of specific federal jurisdictional statutes or state long-arm statutes. In this case, for jurisdiction purposes, the only question is whether a nonresident natural person who intentionally restricts or enjoins the consummation of a commercial transaction in the State of Texas is amenable to the jurisdiction of a federal court sitting in Texas in an action brought by the aggrieved party.

III.

THE DISTRICT COURT OBTAINED JURISDICTION OF THE APPELLANTS PURSUANT TO SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934

Section 27 provides for personal jurisdiction as well as venue in civil suits brought under the 1934 Act. Section 28(a) of the 1934 Act places an affirmative responsibility on states not to enact legislation which conflicts with the provisions of the 1934 Act, including the Williams Act amendments regulating cash tender offers. Section 28(a) is an incorporation of the Supremacy Clause into the federal securities laws. The Idaho Act conflicts with the federal regulatory scheme for cash tender offers and the enforcement of the Idaho Act constitutes the violation or breach of duty in order to bring into play the jurisdictional mechanism of § 27. If § 28(a) is to have any meaning at all, the attempted enforcement of a state statute which conflicts with the 1934 Act breaches a duty. The absence of prohibitory language is not significant. For example, the Commerce Clause is

stated only as an affirmative grant of power to Congress, but this Court has had no difficulty in finding that the language itself imposes limitations on state regulation. If it were necessary to find a "violation" of the 1934 Act, as opposed to a breach of duty, in order to trigger the provisions of § 27, a "violation" has occurred by the attempted enforcement of a state statute which disregards the command of § 28(a). The fact that a violation has occurred does not necessarily lead to the conclusion that state officials would be subject to criminal penalties. The 1934 Act may be violated for purposes of § 27, even though that violation would not result in the imposition of criminal sanctions.

Once the applicability of § 27 is established, any "minimum contact" analysis becomes inapplicable, as only the territorial boundaries of the United States limit the validity of federal process where Congress has provided for nationwide service of process. Appellants at all material times have been resident citizens of the United States and are subject to the exercise of jurisdiction over them by a United States court. Accordingly, any act sufficient to constitute an offense within the Northern District of Texas was adequate to authorize extraterritorial service of process on Appellants.

Personal jurisdiction of Appellants was proper even if a "minimum contacts" analysis is applicable to suits involving a claim brought under § 27 of the 1934 Act. Appellants intentionally caused foreseeable consequences in the Northern District of Texas by ordering that GWU not proceed anywhere in the world with its proposed cash tender offer until the requirements of the Idaho Act were met to the satisfaction of the Idaho officials. Because the consequences of Appellants' activities had a substantial impact on the activities and plans of GWU in the Northern District of Texas, venue under § 27 was established, and service of

process properly made was sufficient to establish personal jurisdiction over Appellants even though they were not physically present in the forum and had not personally engaged in acts or transactions within the forum. As more fully discussed in the argument on the applicability of the Texas Long-Arm Statute, the consequences of the attempted enforcement of the Idaho Act by Appellants having extra-territorial impact were sufficient to support personal jurisdiction over them by the District Court.

IV.

THE TEXAS LONG-ARM STATUTE SUBJECTED APPELLANTS TO PERSONAL JURISDICTION IN THE NORTHERN DISTRICT OF TEXAS

Jurisdictional determinations under the Texas Long-Arm Statute, TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964), depend solely upon the scope of the United States Constitution. The applicability of the Texas Long-Arm Statute is not limited only to proprietary or commercial activities. The statute was designed to provide a forum for Texas residents to redress injuries suffered by the conduct of nonresidents, not merely to regulate proprietary or commercial conduct. Appellants had sufficient minimum contacts with the Northern District of Texas so that the imposition of jurisdiction over them did not offend traditional notions of fair play and substantial justice. Appellants' contacts with the forum were deliberate and not fortuitous. They affirmatively sought to regulate the commercial activity of GWU in Texas and elsewhere by the attempted enforcement of the Idaho Act, causing predictable and adverse consequences in Texas. GWU's suit to declare the Idaho Act unenforceable and to restrain its enforcement arose directly out of Appellants' activities.

V.

VENUE WAS PROPER IN THE NORTHERN DISTRICT OF TEXAS PURSUANT TO SECTION 27 OF THE 1934 ACT

Venue was proper in the Northern District of Texas pursuant to § 27 of the 1934 Act, which provides that venue lies, among other places, in the district in which any act or transaction constituting the breach of duty or violation occurred. The fact that the consequences of Appellants' activities had substantial impact on the operations, intrastate as well as interstate, of GWU at its Dallas, Texas corporate headquarters was sufficient to confer venue there. The crucial element of the attempted enforcement of the Idaho Act was the restraint and resulting harm to GWU. The effects of Appellants' activities in the forum were sufficient to support personal jurisdiction and, therefore, venue there, irrespective of the fact that Appellants were not physically present in that district or engaged in acts or transactions there.

VI.

VENUE IN THE NORTHERN DISTRICT OF TEXAS WAS PROPER UNDER 28 U.S.C. § 1391(b)

Venue in this case was also proper under 28 U.S.C. § 1391(b), the general venue statute applicable to suits which are not based solely on diversity of citizenship. That section provides that such a suit may be brought, among other places, in the federal district "in which the claim arose." Under § 1391(b) venue should be proper in any federal district from which compulsory process can validly issue. In this case the injury to GWU and the restraint of its commercial activities resulting from the impositon of the Idaho Act occurred in the Northern District of Texas. For purposes of

§ 1391(b) the claim thus arose in the Northern District of Texas.

Venue in this suit against Idaho officials should be held proper in the district where their actions and decisions had their effect, not where they were initiated. The present cause of action is based on the effects of the enforcement of the Idaho Act, not the determination by the Idaho officials to apply that Act.

The purpose of providing venue in the district where the claim arose was to assure that venue would be proper in at least one federal district as to all defendants in multi-party litigation. At one point in this litigation, it appeared that three states, New York and Maryland as well as Idaho, would attempt to assert jurisdiction over GWU's offer. Thus, there would have been no district in which all defendants resided and only in the Northern District of Texas, the focal point of Appellants' regulatory activity, could the entire controversy have been tried in a single suit.

VII.

FEDERAL SECURITIES REGULATION PREEMPTS THE IDAHO ACT

The Idaho Act is invalid under the Supremacy Clause of the Constitution of the United States. The constitutional mandate that federal law is the supreme law of the land was restated in the 1934 Act by § 28(a), which forbids state legislation inconsistent with the federal regulatory scheme. The federal regulatory scheme adopted by Congress reflects a policy of neutrality for the purpose of shareholder protection, whereby evenhanded treatment is given the tender offeror and target management in the context of an interstate cash tender offer. Specifically, the legislative history of the Williams Act reveals a studied determination not to require pre-effective filings, agency approvals, or massive disclosure documents, and to regulate the conduct of the tender offeror and target management in an effort to avoid tipping the scales in favor of either. The Idaho Act destroys that congressional policy in the very ways which Congress rejected through the imposition of pre-effective filings, waiting periods, hearing procedures, burdensome disclosure requirements and purported extraterritorial reach, and is so pro-management (and not pro-shareholder) as to apply irrespective of the presence of target company shareholders in Idaho and to give target management *carte blanche* authority to remove from shareholders the very protections the statute was allegedly designed to provide. One immediate result is the imposition of delay to discourage or deter the making of cash tender offers in the first instance, and to give incumbent management the opportunity to further their own self-interest or to defeat the tender offer by bringing into play a variety of defensive tactics. In fact, delay does not necessarily guarantee to target shareholders any benefits at all. The Idaho "fiduciary" approach to shareholder protection conflicts with the "market" approach chosen by Congress by abrogating the policy of neutrality established by Congress.

The federal securities laws, the rules and regulations promulgated by the SEC thereunder, and the myriad of federal cases dealing with tender offers establish a pervasive and complete federal regulatory scheme so as to compel the conclusion that Congress has left no room for supplemental or additional state legislation on access to the national securities marketplace, including access by means of the cash tender offer.

Control of interstate tender offers requires a uniform system of national regulation because non-uniform and conflicting regulation precludes the effective functioning of the national securities marketplace. The need for a uniform system of regulation is exemplified by the situation which actually occurred here, where the States of Idaho, Maryland and New York were asserting, threatening or considering jurisdiction over a tender offeror who had fully complied with all aspects of the disclosure and substantive provisions of the Williams Act.

VIII.

THE IDAHO ACT IMPERMISSIBLY BURDENS INTERSTATE COMMERCE

The Idaho Act is unconstitutional under well-established principles based upon the Commerce Clause of the United States Constitution. The Idaho Act does not effectuate a legitimate local public interest, despite the lip-service it would give to shareholder protection. The true purpose of the Idaho Act is to protect local industry by deterring tender offers in order to maintain and foster local interests and keep incumbent management entrenched. In this very case, the target shareholders suffered economic injury because of the delays caused by target management through operation of the Idaho Act and GWU's reduction of the offering price in response. The direct effect of the operation of the Idaho Act was to impermissibly burden interstate commerce by stopping over 31 million dollars of interstate commerce.

The extraterritorial application of the Idaho Act runs afoul of the policy of free trade reflected in the Commerce Clause. Even if the Idaho Act serves any legitimate local interest, the burden on interstate commerce is excessive in relation thereto. The Idaho Act would purport to apply everywhere in

the world, irrespective of any benefit to any Idaho resident. Idaho can encourage good corporate citizenship in ways which have a far less substantial impact on interstate commerce than by discouraging interstate cash tender offers.

IX.

GWU HAS STANDING TO CHALLENGE THE ENFORCEABILITY AND CONSTITUTIONALITY OF THE IDAHO ACT

The actions of the Appellants effectively enjoined GWU's proposed cash tender offer and tied up GWU's funds. GWU clearly suffered a threatened or actual injury resulting from putatively illegal action and met the "injury in fact" test for standing. Having complied with all requirements of federal law, GWU was uniquely within "the zone of interests" intended to be protected should the Idaho Act prove to be preempted or unconstitutional.

GWU did not seek to base its suit upon any implied cause of action under the Williams Act, and did not seek damages against the target company or anyone else. This Court's opinion in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), holding that a defeated tender offeror had no standing to seek damages from the target company and the successful tender offeror, is not relevant to the issue of standing to assert the unconstitutionality and unenforceability of the Idaho Act. To the extent that decision could have any relevance, this Court specifically left open the question of standing of a tender offeror to sue for relief other than damages, and the congressional policy of evenhandedness in the regulation of tender offeror and target management under the Williams Act supports standing for declaratory and injunctive relief under the 1934 Act. Likewise, GWU did not assert standing on the basis of any violation

of § 10(b) of the 1934 Act or Rule 10b-5 promulgated thereunder, so that *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), is inapplicable.

X.

WAYNE L. KIDWELL (NOW DAVID H. LEROY) SHOULD BE DISMISSED AS A PARTY APPELLANT

Wayne L. Kidwell (now David H. Leroy) should be dismissed as a party Appellant because he did not appeal from the judgment of the District Court and was not a party in the Fifth Circuit from which this appeal has been taken. U. S. Supreme Court Rule 10.

ARGUMENT

I.

THE IDAHO TAKEOVER STATUTE APPLIES EXTRATERRITORIALLY

The question in this case is whether a state may legislate extraterritorially to restrain the internal commerce of a sister state, then claim that courts sitting in that sister state are powerless to rule on the validity of the enactment under the Federal Constitution.

The court below fashioned no new principles of federalism. It took no action to disturb the harmony between sovereigns exercising concurrent jurisdiction. Rather, it applied traditional principles within the proscenium of a state takeover act which intentionally affected and prohibited commerce among the several states and within other states. The Idaho Act thus applied extraterritorially to such an extent that it is repugnant to the Federal Constitution, *see, 70 et seq., infra.*

An interstate cash tender offer is a nationwide public solicitation for shares of a target company. The Sunshine stock

which GWU was attempting to acquire in the course of its tender offer was held by shareholders in virtually every state and was regularly traded on national securities markets. Despite the nationwide character of GWU's tender offer, it was delayed for five months by the Idaho Department of Finance determining to take jurisdiction of the subject matter. The offer was finally made to Sunshine shareholders only after entry of the district court's judgment in the case at bar that the Idaho Act is unconstitutional and unenforceable and subsequent to the circuit court's order of September 16, 1977, refusing to stay that judgment pending appeal. Thus, by application of the Idaho Act, Appellants, for a substantial period of time, denied to residents of all states, including Texas, their rights to determine whether they wished to accept GWU's offer. As Judge Wisdom forcefully observed in his opinion for the Fifth Circuit in this case:

> Idaho Code § 30-1530(1) states, in part, that "It is unlawful for any person to make a takeover offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director." As interpreted by the Idaho Department of Finance, this provision would prevent Great Western from making a tender offer to anyone in the world if it did not comply with the Idaho statute.[12]

The teachings of this Court prohibit Appellants from asserting this extraordinary power over the commerce of other states and support the jurisdiction of courts sitting in those

[12] 577 F.2d at 1263. Similarly, the district judge concluded that:

> Officials of Idaho . . . give extraterritorial effect to their takeover statute[ ] by forbidding tender offerors under their jurisdiction from making any offer to residents of another state which is not made to residents of Idaho.

District Court's Findings of Facts and Conclusions of Law filed April 21, 1977 at 6.

other states to pass on the legality of the exercise of such extraterritoial regulations. A state may not refuse to recognize the territorial limits of its legislative authority. Legislative enactments can have binding effect only within the territorial confines of the jurisdiction passing the law. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Hilton v. Guyot*, 159 U.S. 113 (1895). By virtue of an Idaho statute a corporation with its principal place of business in Dallas, Texas was forbidden from making an offer to the 439 individual shareholders of Sunshine who resided in Texas as well as those Sunshine shareholders who resided throughout the nation. This Court has never tolerated such an abuse of sovereign powers. In *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 540 (1935), Justice Stone stated:

> The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. . . . Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state.

In that case this Court upheld the California workmen's compensation statute as applied to an injury sustained by an employee injured in Alaska because:

> The California statute does not purport to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals nor did the judgment of the state supreme court give it any. The statute assumes only to provide the remedy to be granted by the California Commission for injuries, received in the course of employment entered into within the state, wherever they may occur.

Id. The Idaho statute here at issue does far more. It prohibited the formation of contracts for the purchase and sale

of securities where no Idaho residents were involved. Indeed, the Idaho statute by its terms, purports to apply to tender offers even if the target company has no shareholders who reside in Idaho. Application of the statute is wholly unrelated even to the existence of that class of persons whom it allegedly protects.

> None of the state [takeover] statutes base their [sic] jurisdiction over tender offers on the residency of the offeree-shareholders. Instead, they purport to protect all shareholders, regardless of their place of residence. Most states even go so far as to prohibit tender offers that exclude the residents of that state. It thus appears that the protection of state shareholders is neither the primary purpose or the resultant effect of state tender offer statutes.

E. ARANOW, H. EINHORN AND G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL at 230 (1977); Idaho Act § 30-1506(1). Thus, it is inconceivable that the Idaho statute was intended to apply only within the confines of the State of Idaho and the legal presumption that a legislative enactment is not intended to apply outside the territorial jurisdiction of the state in which it is enacted is completely dispelled.

The Supreme Court of Minnesota has recently ruled on the constitutionality of a statute of that state which declared it a felony to detain one's own child outside the state with the intent to deny another's rights under an existing court order. *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978). The statute, the court held, violated the Sixth Amendment of the U. S. Constitution in that it purported to apply Minnesota criminal law extraterritorially. The court could find no ". . . adequate grounds for disregarding limitations on extraterritorial jurisdiction which have long been recognized as the law of the land." *Id.* at 625. The Minnesota court spoke to another flaw in the Minnesota statute which is shared by the Idaho Act.

> One further serious infirmity in the statute is its potential application where no contact between the parents, the child and the state of Minnesota exists. The state's argument assumes that the statute is intended to protect only the welfare of children residing with a parent in Minnesota pursuant to rights conferred by a Minnesota court. The statute is not so limited. For example, by its plain language, it would also make it a felony in Minnesota for a California parent to wrongfully detain a child from a parent living in Colorado in violation of rights conferred by a Nebraska court order. Granted Minnesota is not likely to assume jurisdiction under such circumstances, this hypothetical simply illustrates the scope of the prohibition included in [the statute] and points up the difficulty of determining with certainty what interests the statute is designed to protect.

Id. at 627-8.

Similarly, the Idaho Act was applied here to a tender offer involving a target company incorporated in Washington and an offeror which is incorporated in Delaware with its principal place of business in Texas. This application precluded the Texas-based corporation from purchasing stock held by residents of Texas and every other state whether or not any target company shareholders, for whose benefit the Idaho Act purports to exist, reside in Idaho. This gives one pause to wonder "what interests the statute is designed to protect." Like the Minnesota Legislature, the Idaho Legislature may have acted with a salutary intent, but in passing the Idaho Act "it has reached too far." *Id.* at 628.[13] As Judge Wisdom concluded for the Fifth Circuit:

> The Idaho legislature, through its extraterritorial law, made the entire country its laboratory. The takeover

[13] The Minnesota Supreme Court also accurately explained the paucity of cases involving the extraterritorial application of state statutes: "The fact that so few courts have addressed the question suggests traditional restraint in prosecuting offenses committed outside the borders of a state is broadly accepted." 273 N.W.2d at 628.

> statute had extensive, deliberate, and foreseeable effects on transactions having only a minimal connection with Idaho.

577 F.2d at 1287.

In deciding the extent to which the Full Faith and Credit Clause requires the courts of one state to apply and enforce the statutes of sister states this Court declared:

> [I]n the case of statutes, the extrastate effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.

Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493, 502 (1939). This Court's conclusion that the Full Faith and Credit Clause "does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it" (*Id.* at 504-5) has recently been reaffirmed. *Nevada v. Hall*, 47 U.S.L.W. 4261, 4265 (March 5, 1979). Thus, a State is not required by the Full Faith and Credit Clause to apply the statute of a sister state which conflicts with its own valid domestic policy. However, if the courts sitting within a state choose to apply the statute of another state which by its terms purports to apply to the case at hand, surely that court, which could have rejected application of the statute altogether, must be free to determine the validity of the statute.

Appellants, as they must, concede that the Idaho statute applies extraterritorially. However, they take the position that ". . . states are entitled to have laws with an extra-

territorial effect. . . ." Appellants' Brief at 46. To support this notion they say it is established domestic relations law that actions are permissible which involve the status of marriage in situations where personal jurisdiction over one of the spouses is lacking. First, there is a difference between a statute which has a residual extraterritorial effect and one which intentionally applies to circumscribe behavior by parties who are not residents of the state. "Obviously the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences." *Alaska Packers Association v. Industrial Accident Commission, supra,* at 541. Clearly, in a domestic relations situation, if the court has subject matter jurisdiction and personal jurisdiction over *one* of the parties it has sufficient "control over the status" of the marriage to permit a state to prescribe "legal consequences" which would not be "limited to occurrences within the state." Appellants' analogy is unsound. It is one thing for a state to assert jurisdiction over a marital relationship where one of the parties is subject to its jurisdiction. But the Idaho statute here under consideration is more analogous to a domestic relations law passed by the State of Idaho which purports to determine whether two Texas residents can enter into a binding marriage if one of them happens to own some property in the State of Idaho.

Appellants next argue that the general corporation law of a state has effects on shareholders outside the state. Once again, to say that a corporation in its internal affairs is subject to the jurisdiction of a state's corporation law which thereby determines various rights of shareholders wherever they may reside is something quite different from saying that Idaho could apply its corporation law to regulate directly the internal affairs of Texas-based corporations. Indeed, the con-

stitutionality of state Blue Sky laws which provide intrastate regulation of the issuance of securities was upheld prior to the passage of any federal securities laws of general applicability on the express ground that they applied only "within the state." *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917).

In *Hall v. Geiger-Jones Co., supra,* dealers in corporate securities argued against the validity of the provisions of the Ohio Blue Sky law, claiming such provisions constituted an undue burden on interstate commerce in contravention of the Commerce Clause of the Constitution of the United States. This Court looked first to the language of the statute which prohibited any dealer *within this state* from disposing of certain securities without first being licensed to do so by Ohio. Emphasizing the intrastate nature of the statute, this Court stated:

> The provisions of the law, it will be observed, apply to dispositions of securities *within* the state, and while information of those issued in other states and foreign countries is required to be filed (§ 6373-9), they are only affected by the requirement of a license of one who deals with them *within* the state. Upon their transportation into the state, there is no impediment, — no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess, — and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they

> having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally.

Id. at 557-8 (citations omitted).

When the Securities Act of 1933 and the 1934 Act were passed each contained a provision which preserved this intrastate regulation. The House Committee Report on the 1933 Act stated: "The bill carefully preserves the jurisdiction of state security commissions to regulate transactions *within their own borders.* [H. Rep. No. 85, 73d Cong., 1st Sess., P. 10 (1933) (Emphasis supplied)]."[14]

The present controvery involves the assertion of jurisdiction by the State of Idaho over an interstate tender offer which involved an offeror which is neither incorporated nor licensed to do business in Idaho and a target company which is not incorporated in the State of Idaho, all with utter disregard for the residence of target company shareholders who are allegedly the persons for whose protection the Idaho

[14] Subsequent decisions have repeated that a state securities law can have no extraterritorial effect. Thus, California may not regulate the issuance and sale of securities outside its borders, *Jones v. R-Mine Oil Co.*, 119 P.2d 219 (1941); *Los Angeles Fisheries v. Crook*, 47 F.2d 1031 (5th Cir. 1931). California may, however, regulate for the protection of its residents and citizens the issuance and sale within its borders of stock of a corporation organized elsewhere. *Gillis v. Pan American Western Petroleum Co.*, 3 Cal.2d 249, 44 P.2d 311 (1935). There is no right of action under the Illinois Securities Law of 1919 unless the sale complained of takes place in Illinois. *McBreen v. Iceco, Inc.*, 12 Ill.App.2d 372, 139 N.E.2d 845 (1956), citing Fletcher, *Cyclopedia of Corporations* (1945 Rev. Vol. [now 1975 Rev. Vol.]) Sec. 6742, for the proposition that the Blue Sky laws have no extraterritorial effect. It was held fundamental that the Indiana Blue Sky Law can have no extraterritorial effect in *Brocalsa Chemical Co. v. Langsenkamp*, 32 F.2d 725 (6th Cir. 1929). The securities laws of Utah are not applicable to contracts for the sale of securities in Nevada. *United States Bond & Finance Corp. v. National Bldg. & Loan Assn. of America*, 80 Utah 62, 12 P.2d 758 (1932). The Blue Sky requirements of Alabama are inapplicable to sales of stock in Mississippi, notwithstanding the fact that the corporation was organized under Alabama law. *Guinn v. Shulters*, 78 S.2d 114 (1955).

statute exists. Therefore, the courts below were not asked to determine the manner in which the State of Idaho may permissibly govern its internal affairs or the way in which it may regulate the status of relationships which have a sufficient nexus with the state. Those courts were required only to determine whether the Idaho Act could be applied to regulate and halt commerce within the State of Texas and throughout the nation.

By its extraterritorial reach the Idaho Act violated the most basic principle of federalism — that each state is sovereign except as otherwise provided in the U.S. Constitution. Sovereignty exercised by a state beyond its borders is usurpation — a usurpation which a state should be called upon to justify in courts sitting in the state whose sovereignty was impugned by the extraterritorial regulation. "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" *Buchanan v. Rucker*, 103 Eng. Rep. 546, 547 (K.B. 1808).

II.

THIS SUIT IS NOT BARRED BY THE ELEVENTH AMENDMENT

The teaching of *Ex parte Young*, 209 U.S. 123 (1908) has remained unlimited by this Court's holdings and stands unchallenged by the Appellants. A suit by an aggrieved person to restrain a state official from enforcing an allegedly unconstitutional state statute is a suit against the state official in his individual capacity and therefore is not barred by the Eleventh Amendment. "This Court has long held that a suit to restrain an unconstitutional action threatened by an individual who is a state officer is not a suit against the State." *Georgia Railroad & Bank Co. v. Redwine*, 342 U.S. 299, 304

(1952). And in *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court once again decreed that the granting of prospective injunctive relief against state officials acting unconstitutionally is sanctioned by *Ex parte Young*. The doctrine of *Ex parte Young* is such a cornerstone of federal jurisdiction that the Fifth Circuit was prompted to write:

> So far as concerns "sovereign immunity" as a defense to a suit to enjoin state or federal officials from failing to comply with the laws spelling out their legal authority, the raising of such a defense in this action borders on the frivolous.

Ragland v. Mueller, 460 F.2d 1196, 1197 (5th Cir. 1972).

This Court has consistently declined invitations to overrule or limit the scope of *Ex parte Young*. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-157 n. 6 (1978). And despite the limitation of *Ex parte Young* to suits for prospective injunctive relief, this Court has held that costs of compliance with prospective orders issued by federal courts are "ancillary" to the order enforcing federal law. Therefore, the Eleventh Amendment does not prevent an award of attorney's fees against state officers in their official capacities, for such an award is indistinguishable from other penalties imposed to enforce prospectve injunctions issued by federal courts. *Hutto v. Finney*, ... U.S. ....., 98 S.Ct. 2565 (1978).

Appellants take the position that the *Young* doctrine permits a state official to be sued only in his home state. There is no justification for engrafting such a limitation onto the doctrine. Where the doctrine applies a state official is "stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 160. Once the barrier of the

Eleventh Amendment is lowered there is no justification for distinguishing between a state official and a private litigant. He, like any other litigant in the federal courts, would be subject only to the jurisdiction of those courts which can exert personal jurisdiction over him in consonance with due process guarantees. The Fifth Circuit correctly and logically applied the doctrine of *Ex parte Young* as its progeny dictates, concluding:

> We read *Young* to say a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young*, the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act.

577 F.2d at 1265. Thus, if a federal statute or a state long-arm statute provides a federal court with jurisdiction over the person of a private litigant in a given situation, personal jurisdiction should also be proper over a nonresident state official who has been stripped of his sovereign character.

The instant case bears a striking resemblance to *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975) in which government officials in Louisiana were subjected to the jurisdiction of a federal court sitting in Wisconsin by virtue of the application of that state's long-arm statute. The plaintiff in that case had been arrested on a minor traffic violation in Milwaukee, Wisconsin. Following standard procedure, the police checked the Federal Bureau of Investigation's National Crime Information Center ("NCIC") to determine whether he was wanted in any other jurisdiction. He was, in fact, wanted on felony charges in Baton Rouge, Louisiana. However, extradition was not effected and he was released although he was subsequently arrested on the basis of the NCIC information. The plaintiff filed an action challenging

the use of the NCIC to locate and detain him so that he could be extradited to Louisiana. The suit, filed in the Eastern District of Wisconsin, was brought against the Chief of Police of Baton Rouge, Louisiana and a police officer of that force. The defendants also included the District Attorney for the East Baton Parish and an Assistant District Attorney. The plaintiff specifically alleged that each of the defendant officials resided in Baton Rouge, Louisiana. The court determined that the use of the NCIC system by the police and prosecutors from Louisiana to detain the plaintiff in Wisconsin constituted sufficient "contacts" with the forum to support jurisdiction in the case based on 42 U.S.C. § 1983. Just as § 1983 permits suits against state officials, so the doctrine of *Ex parte Young* permits such suits in those cases to which it applies. Once it is established that the suit may be brought, whether by virtue of § 1983 or the *Young* doctrine, the question of where that suit may be brought should be resolved by focusing on specific statutes of Congress which dictate where the suit may be brought or upon the "contacts" of the defendant officials with the forum district.

This Court recently held in *Nevada v. Hall*, 47 U.S.L.W. 4261 (March 5, 1979) that there is no constitutional impediment to preclude a state from empowering its courts to entertain suits brought by its citizens against other states. A state's immunity from suit in the courts of another state is a matter of comity alone. *Id.* at 4265. In his opinion for this Court Justice Stevens noted that the Eleventh Amendment does place explicit limits on the powers of federal courts to entertain suits against a state. Referring to those limitations this Court stated:

> Even as so limited, however, the Eleventh Amendment has not accorded the States absolute sovereign immunity in federal court actions. The States are subject to suit by both their sister States and the United States. . . . Further, prospective injunction and declaratory relief is available against States in suits in federal court in which state officials are the nominal defendants.

Id. at 4246, n.19. Where the doctrine of *Ex parte Young* is applicable the reasoning of *Nevada v. Hall* should control a court's analysis in determining the amenability of a state official to the personal jurisdiction of a federal court sitting in a state other than that in which the state official resides. Where no specific constitutional restraints prevent the exercise of such jurisdiction, the threat that such suits will cause attorneys general of the states to be constantly traveling about the country defending lawsuits is insufficient to deny the jurisdiction. Such a fear, however, is unfounded. Only when a state official attempts to exercise his authority beyond his jurisdictional limits or otherwise has sufficient contacts with another state may he be subjected to the jurisdiction of a court sitting in that state. Interestingly, this Court's decision in *Nevada v. Hall* would squarely support jurisdiction in the instant case if GWU had brought its suit in a Texas state court and Texas had chosen not to recognize a defense of sovereignty.

The argument that *Ex parte Young* permits a state official to be sued only in federal courts located in the state where he holds office is further undercut by the concurring opinions of four members of this Court in *California v. Texas*, ... U.S. ....., 98 S.Ct. 3107 (1978). Those opinions suggest the availability of a federal interpleader action where an estate is potentially subject to the conflicting tax claims of two or more states. The ratio decidendi of those opinions is that a federal forum exists wherein personal jurisdiction over the taxing officials of both Texas and California is proper. The officials of at least one state must defend the ac-

tion in a federal district court outside the state in which they hold office. The *power* to compel a state official to defend a suit against him outside his home state exists. Therefore, the remaining, and conventional, inquiry is whether the nonresident official is subject to personal jurisdiction of the court by virtue of the provisions of a federal statute or otherwise has sufficient contacts with the forum to support its assertion of personal jurisdiction.

As the Fifth Circuit noted, the propriety of personal jurisdiction in Texas in this suit was a function of Idaho's regulatory activities, not the trial court's failure to properly understand and apply the *Young* doctrine.

> The dearth of previous cases where a state official has been sued outside his home state is probably attributable to the states having rarely, if ever, enacted statutes similar to the Idaho Take-over law (and most other state take-over laws) that purport to extend a local official's regulatory jurisdiction to other states.

577 F.2d at 1266. For jurisdiction purposes, the question posed to the courts below was simply whether a nonresident natural person who performs acts which intentionally restrict or prevent the consummation of business transactions in the State of Texas is amenable to the jurisdiction of a federal court sitting in Texas in a suit brought by an aggrieved party.

Appellants cite *Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972) and *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 171 (D. Idaho 1976) to support their contention that federal cases have shown a "consistent pattern" to permit suits against state officials only in federal courts within their home states. Neither of these cases demonstrates an application of that proposition. In *Turner* the

court never intimated that it was impossible for a federal court to exercise personal jurisdiction over a nonresident state official. Instead, the court merely determined that the nonresident state officials lacked sufficient minimum contacts with the forum to support personal jurisdiction under the facts of the case as presented. In fact, the *Turner* decision would support the propriety of exerting personal jurisdiction over Appellants in Texas in that it (1) recognizes the vitality of *Ex parte Young*, (2) treats state officials who are stripped of their Eleventh Amendment immunity the same as any nonresident defendant and applies conventional due process standards to determine whether personal jurisdiction of them is proper and (3) acknowledges that the commission of an act calculated to have an effect in a state can constitute a sufficient contact with that state for purposes of personal jurisdiction. The *Idaho Potato Commission* case affords Appellants no support for that case did not involve a state official. The court, in effect, determined that the Washington Potato Commission was not a state agency. 410 F. Supp. at 176-7. Therefore, the individual commissioners could not be considered state officers.

III.

THE DISTRICT COURT OBTAINED JURISDICTION OVER THE APPELLANTS PURSUANT TO SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934

Personal jurisdiction over Appellants was proper under § 27 of the 1934 Act which provides that a suit or action to enforce any liability or duty created by the Act, or the rules and regulations promulgated thereunder, may be brought in the district wherein any act or transaction constituting the violation occurred and process may be served in any other district of which the defendant is an inhabitant or

wherever the defendant may be found.[15] "Without question the intent of the venue and jurisdiction provisions of the securities laws is to grant potential plaintiffs liberal choice in their selection of a forum." *Ritter v. Zuspan*, 451 F. Supp. 926, 928 (E.D. Mich. 1978).

Section 27 provides for personal jurisdiction as well as venue in civil suits brought under the 1934 Act. *See, e.g., S-G Securities, Inc. v. Fuqua Investment Co.* [CURRENT] FED. SEC. L. REP. (CCH) ¶ 96,750 (D. Mass. Dec. 19, 1978). Appellants argue that the provisions of § 27 are inapplicable because they committed no "violation" of the Act to trigger the jurisdictional provisions. However, § 27 is applicable to enforce "any . . . duty . . . *or* to enjoin any violation. . . ." (Emphasis supplied.) Section 28(a) of the 1934 Act places an affirmative obligation on states not to enact legislation which conflicts with the provisions of the 1934 Act of which the Williams Act is a part. The specific conflicts between the Williams Act and the Idaho statute are addressed in detail, *infra*, in the discussion relating to the preemption of the Idaho Act. Appellants argue that § 28(a) imposes upon them no affirmative duty which can be violated for purposes of § 27. But the clear implication of the language of § 28(a) is that it prohibits state officials from enforcing state statutes in

[15] 15 U.S.C. § 78aa (1970). That section provides in pertinent part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

conflict with the 1934 Act,[16] and § 27 is the jurisdictional mechanism provided by Congress to enforce the policy of § 28(a). For § 28(a) to have any meaning the attempted enforcement by a state official of a statute which conflicts with the 1934 Act breaches a duty. As the Fifth Circuit noted, the lack of prohibitory language in § 28(a) is insignificant.

> The commerce clause, for instance, is written only as an affirmative grant of power to Congress. Without any difficulty, courts find that the language also imposes self-executing limitations on regulation by the State.

577 F.2d at 1271. Therefore, little can be made of Appellants' argument that "all section 28(a) provides is that state regulation which *does not* 'conflict' *is permitted*." Appellants' Brief at 56. Section 28(a), in essence, is a restatement of the Supremacy Clause thus imposing statutory as well as constitutional restrictions on the scope of state regulation.

Even were it necessary to find a "violation" of the 1934 Act as opposed to the breach of a duty imposed by that Act in order to trigger the provisions of § 27, personal jurisdiction over Appellants under that section is proper because the attempted enforcement by a state official of a state law which conflicts with the Act is a "violation" of § 28(a). The commission of a prohibited act constitutes a "violation" of a legislative enactment. *Goodman v. Hentz & Co.*, 265 F.Supp. 440, 447 (N.D. Ill. 1967); *Kardon v. National Gypsum Co.*, 69 F.Supp. 512, *modified on other grounds*, 83 F.Supp. 613 (E.D. Pa. 1946). This Court has also concluded that "a disregard of the command of the statute is a wrongful act. . . ." *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 35, 39 (1916). Any activity or transaction

[16] Fifth Circuit Opinion, 577 F.2d at 1271.

which is proscribed by any provision of the 1934 Act is a "violation" for purposes of the Act. In referring to § 16(b) one district court determined that "[i]ndulgence in the prohibited practice was clearly a 'violation' of the Act." *Grossman v. Young*, 70 F.Supp. 970, 971 (S.D.N.Y. 1947).

Appellants argue that as state officials they cannot be said to have "violated" the 1934 Act because this "would lead to the inevitable conclusion that state officials who act to enforce a conflicting state law would be deemed 'wilful violators' of the Act and subject to fine or imprisonment under section 32(a) thereof." Appellants' Brief at 57. However, as the Fifth Circuit concluded, a "violation" for purposes of § 27 need not be a violation for purposes of other sections providing for criminal sanctions. A duty not to enact or enforce conflicting state laws "would not be enforceable through criminal sanctions, but could be violated for purposes of § 27." 577 F.2d at 1272. In *Gratz v. Claughton*, 187 F.2d 46 (2d Cir. 1951) the court, in a case under § 16(b) of the 1934 Act, stated:

> The section forfeits the profits because it forbids dealings in the shares. Nobody is obliged to become a director, an officer, or a "beneficial owner"; just as nobody is obliged to become the trustee of a private trust; but, as soon as he does so, he accepts whatever are the limitations, obligations and conditions attached to the position, and any default in fulfilling them is as much a "violation" of law as though it were attended by the sanction of imprisonment.

Id. at 49. Thus, a "violation" of the 1934 Act was recognized in a situation where the violation could not result in the imposition of criminal sanctions. *See*, II L. Loss, Securities Regulation at 1044-45 (2d ed. 1961). Enforcement of the Idaho Act against GWU and Texas shareholders of Sunshine is an act committed in Texas which constituted an integral part of the Appellants' enforcement of an unconstitutional

state statute. The enforcement of the Idaho statute affected GWU in Texas and, as a consequence of the enforcement of that statute, GWU's business activities within Texas and with persons in other states besides Idaho were restrained. All of this was a direct result of Appellants' derogation of their duty not to enforce a statute in conflict with the Williams Act.

1.

"Minimum Contacts" Analysis Is Unnecessary In Determining Whether The Trial Court Had Personal Jurisdiction Over Appellants In Accordance With § 27 Of The 1934 Act

Only the territorial limits of the United States circumscribe the validity of federal process. Just as a state has power over the persons within its territorial limits, the United States has power over those within its territorial limits. *First Flight Co. v. National Carloading Corp.*, 209 F.Supp. 730, 736 (E.D. Tenn. 1962). In *Kramer v. Scientific Control Corp.*, 365 F.Supp. 780 (E.D. Pa. 1973), an action brought under the antifraud provisions of the federal securities laws, the court concluded that minimum contacts due process analysis is appropriate to determine whether a nonresident defendant is subject to the provisions of a state's long-arm statute but serves no purpose where a plaintiff in a federal court asserts a right under a federal statute which provides for nationwide service of process.

> . . . regarding the claim of insufficient minimum contacts with this district, it must be remembered that the United States is one jurisdictional area, even though it may be divided into fifty states and numerous judicial districts. Congress does not have to resort to the concept of a "long-arm" statute which brings into play considerations of "presence" or "minimum contacts"

> when the issue of eligibility to be served by state process is a question in a litigation. Rather, Congress has the power to provide for the reach of service of process to the outer limits of the reach of its legislative power which, of course, is anywhere in the United States or its territories. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 442 . . . (1946). If suit under the Federal securities anti-fraud acts and the rules thereunder is brought in a Federal court, the purchaser has the privilege of nationwide service of process. . . . The issue here is not one of constitutional due process but one of compliance with the statute and the Federal Rules of Civil Procedure.

Id. at 787. *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979) was an appeal from a district court's dismissal of a defendant in a federal securities fraud action for lack of personal jurisdiction. The district court had concluded that the defendant lacked sufficient minimum contacts with the State of Illinois to satisfy the requirements of its long-arm statute. The Seventh Circuit concluded that the due process requirement that a nonresident defendant must have minimum contacts with the forum state to be amenable to personal jurisdiction did not apply to a claim based on the 1934 Act.

> Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.
>
> This analysis and conclusion has been well established since *United States v. Union Pacific R.R.*, 98 U.S. 569 (1878). There the Supreme Court, in upholding the *in personam* jurisdiction of a circuit court in a federal action against parties residing outside the state in which the circuit court sat, noted:
>
> > The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the federal government exercises dominion. . . .
>
> *Id.* at 603. . . . This conclusion has been specifically applied to uphold the validity of nationwide service of process under § 27 of the 1934 Securities Exchange Act. In *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974), the Second Circuit upheld under § 27 the jurisdiction of a federal district court in New York over a defendant served in Massachussetts stating:
>
> > [W]here, as here, the defendants reside within the territorial boundaries of the United States, the "minimal contacts," required to justify the federal government's exercise of power over them, are present. Indeed, the "minimal contacts" principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but *not* extra-territorial service of process. It is only the latter, quite simply which even raises a question of the forum's power to assert control over the defendant.
>
> *Id.* at 1143.

Fitzsimmons at 333-4. To the same effect is *Stern v. Gobeloff*, 332 F.Supp. 909 (D. Md. 1971). In the context of 1934 Act cases, due process requirements become significant only if the sovereign, *i.e.*, the United States in such a federal cause of action, attempts to provide for personal service of process on a nonresident foreigner. *Id.; Fitzsimmons* at 334 n.4 ("service beyond the bounds of the territorial United States obviously raises questions as to the contact of the defendant with the United States, questions that are absent when a United States citizen is served within the country"). There-

fore, any act sufficient to constitute an offense within the forum district is adequate to authorize extraterritorial service of process.

2.

Personal Jurisdiction Of Appellants Was Properly Obtained Even If Minimum Contacts Analysis Is Applied To Suits Involving Claims Brought Under § 27 Of The 1934 Act

A foreseeable consequence which occurs in the forum district is sufficient to permit extraterritorial service of process over the entity which caused the result. *See, Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972) (this proposition is more fully explored, *infra*, in the discussion of the applicability of the Texas Long-Arm Statute in this case). In *Travis v. Anthes Imperial Limited*, 473 F.2d 515 (8th Cir. 1973), plaintiffs, American shareholders of a Canadian corporation, charged various defendants with misrepresentations in regard to a tender offer. The court declared that "personal jurisdiction can be acquired over the defendants who have acted within the district or *sufficiently caused foreseeable consequences* by service of process on them in Canada." (Emphasis supplied) *Id.* at 529. Where the consequence of a defendant's activities has substantial impact on the operation of a corporation in the forum district, venue under § 27 is established and

> Once it is established that venue is proper in the district in which the action under the 1934 Act is brought, service of process properly made is sufficient under Section 27 to establish *in personam* jurisdiction over the defendants even if they are not physically present in the forum and have not personally engaged in acts or transactions within the forum.

S-G Securities Inc. v. Fuqua Investment Co., supra, at 94, 932.

On March 25, 1977, Melvin J. Baptie, Idaho's Deputy Administrator-Securities of the Department of Finance, mailed a letter to GWU's counsel in Dallas, Texas commenting on the registration statement filed in Idaho by GWU, which consisted of the Schedule 13D filed with the SEC. In that letter he requested substantial additional information from GWU in addition to that contained in the Schedule 13D. He advised that should GWU decide not to file the requested information the Director of the Department of Finance was prepared to initiate a hearing to determine whether GWU had made sufficient disclosure. Accompanying the letter was an Order summarily issued by Appellant McEldowney which, in effect, enjoined GWU's proposed interstate cash tender from being made anywhere in the nation. This letter, received in the Northern District of Texas by GWU, was more than an immaterial part of Appellants' restraint of GWU's proposed interstate tender offer. The letter and Order were a signicant facet of Appellants' breach of their duty not to enforce state statutes which conflict with the 1934 Act. Therefore, the transmission of these documents into Texas supports personal jurisdiction over Appellants as well as venue in the Northern District of Texas under § 27 of the 1934 Act.

The Appellants' attempted enforcement of the Idaho statute foreseeably caused grave economic consequences to GWU in Texas and precluded the conduct of commercial activities within Texas and between Texas and states other than Idaho. As is demonstrated, *infra*, in the discussion of the applicability of the Texas Long-Arm Statute, these consequences of the attempted enforcement of a statute having extraterritorial impact were sufficient to support personal jurisdiction over Appellants in the Northern District of Texas.

IV.

THE TEXAS LONG-ARM STATUTE SUBJECTED APPELLANTS TO PERSONAL JURISDICTION IN THE NORTHERN DISTRICT OF TEXAS

1.

Jurisdiction Pursuant To The Texas Long-Arm Statute Is As Broad As Federal Due Process Permits

The Texas Long-Arm Statute, TEX. REV. CIV. STAT. ANN., art. 2031b (Vernon 1964)[17], is an effort by Texas to reach as far as federal constitutional requirements of due process will permit in exercising *in personam* jurisdiction over nonresident defendants. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974).

The propriety of personal jurisdiction in a federal court which employs a long-arm statute depends upon whether the statute purports to confer jurisdiction and whether the assertion of such jurisdiction accords with constitutional principles of due process. *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). *U-Anchor* unequivocally instructs that jurisdictional determinations in Texas courts depend solely upon the scope of the United States Constitution, thus placing the imprimatur of the Texas Supreme Court on the approach to personal jurisdiction in Texas which numerous federal courts had previously adopted. In *Southern National Bank v. TriFinancial Corporation*, 317 F.Supp. 1173, 1191 (S.D. Tex. 1970), the court indicated that a determination of the scope of the Texas Long-Arm Statute "reduces to due process, for the Long-Arm of Texas has as great a reach as due process permits." Because of this authoritative interpretation of the Texas Long-Arm Statute its scope should be considered coextensive with the outer limits of due process. If constitutional principles would permit the exertion of personal jurisdiction, article 2031b purports to apply.

However, Appellants argue that the long-arm statute does not, by its terms, apply to the situation at bar because state officials attempting to enforce a state statute cannot be "doing business" as that phrase is used in the statute. There is no reason to suppose that the phrase "doing business" as used by the Texas Legislature was intended to be limited only to proprietary or commercial activities as Appellants suggest. Quite to the contrary, the statute refers not only to contracts and torts but also provides that it applies to ". . . other acts that may constitute doing business. . . ." The commission of a tort is not commercial activity but is deemed to be "doing business" for purposes of the Texas statute. "The words of the statute are that 'the committing of any tort in whole *or in part*' in Texas is sufficient to constitute 'doing business,' the predicate for long-arm jurisdic-

[17] Article 2031b provides in pertinent part:

> Sec. 3. Any . . . non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such . . . non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such . . . non-resident natural person is a party or is to be made a party.
>
> Sec. 4. For the purpose of this Act, *and without including other acts that may constitute doing business*, any . . . non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. (Emphasis supplied).

tion." *A. L. Black v. Acme Markets, Inc.*, 564 F.2d 681, 685 (5th Cir. 1977). The Texas statute was designed to provide a forum for Texas residents who are injured by the conduct of nonresidents, not merely to regulate commercial activities. The district judge in this case correctly determined that "'[d]oing business' under § 2031b includes all acts or omissions which subject the defendant to the exercise of jurisdiction by Texas courts; the terminology has no commercial import."[18] Indeed, the prototype of all long-arm statutes, nonresident motorist statutes, were completely unrelated to any commercial, profit-oriented activities on the defendant's part. *See, Hess v. Pawlowski*, 274 U.S. 352 (1927); 2 J. MOORE'S FEDERAL PRACTICE ¶ 4.41-1[2] (2d ed. 1977).

U-Anchor's pronouncement that the Texas statute is designed to go to the limits of due process is predicated upon the fact that "such a construction is desirable in that it allows the courts to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define 'doing business'." 553 S.W. 2d at 762; *see*, Thode, *In Personam Jurisdiction; Article 2031b, the Texas "Long-Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279 (1964). Thus, the proper inquiry for a court is whether sufficient minimum contact exists rather than whether a technical definition of "doing business" is met. Nevertheless, "Idaho's 'business' is to regulate. It was conducting that business in Texas." Fifth Circuit Opinion 577 F.2d at 1268. Thus, the Fifth Circuit properly framed the issue presented in this case:

> The question is whether due process permits a court in Texas to exercise jurisdiction of the Idaho official who has enforced the Idaho takeover law to prevent a Texas-based corporation from proceeding with a national tender offer.

[18] District Court's Findings and Conclusions of Law at 6.

577 F.2d at 1266.

2.

Appellants Had Sufficient Minimum Contacts With Texas To Justify In Personam Jurisdiction

It is axiomatic that a nonresident defendant is subject to the jurisdiction of a federal court by virtue of the application of a state long-arm statute if he has sufficient minimum contacts with the forum so that the imposition of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As it pertains to the application of the Texas Long-Arm Statute, the due process standards enunciated in *International Shoe* require that:

> First "there must be some minimum contact with the state which results from an affirmative act of the defendant." Secondly, "it must be fair and reasonable to require the defendant to come into the state and defend the action." 2 Moore[']s Federal Practice] note 16, § 4.25[5] at 1171-72.

Product Promotions Inc. v. Cousteau, 495 F.2d 483, 494 (5th Cir. 1974).

a.

Appellants Engaged In Purposeful Activity.

Appellants argue that the *International Shoe* due process standards apply exclusively to commercial, profit-oriented enterprise because those standards require that a defendant must perform some act "by which [it] purposefully avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its

laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The purpose of these requirements is really to insure that the unilateral activity of a plaintiff who claims a relationship with a nonresident will not support jurisdiction. The standards are designed to focus attention on the conduct of the defendant to assure that his "contacts with the forum were deliberate rather than fortuitous . . . ." *Product Promotions, supra*, at 496. As the Fifth Circuit noted,

> Personal jurisdiction has been found to exist over price fixing conspirators whose illegal activities in one state were designed to control prices in the forum state. *Hitt v. Nissan Motor Co., Ltd*, 1975 S.D. Fla., 399 F. Supp. 838, *vacated on other grounds*, 5 Cir. 1977, 552 F.2d 1088; *Maricopa County v. American Petrofina, Inc.*, 1971 N.D. Cal., 322 F. Supp. 467. Those conspirators, of course, had not invoked the benefits and protections of the forum state's laws in a restrictive sense.

577 F.2d at 1268-69. Thus, the proper focus of inquiry is whether the defendants "engage[d] in some purposeful activity in this State or have inflicted injuries upon, or incurred obligations to, those entitled to legitimate protection." *Darden v. Heck's, Inc.*, 459 F. Supp. 727, 731 (W.D. Va. 1978). Appellants cannot be heard to argue that they did not purposefully undertake to enforce the Idaho Act. This attempted enforcement had a significant impact in Texas.

b.

Appellants Caused Reasonably Foreseeable Consequences In Texas.

Lower federal courts and state courts have uniformly considered it possible to satisfy the "minimum contacts" test if it is established that a defendant engaged in activity outside the forum state which caused reasonably foreseeable consequences within the state. *See, e.g., State ex rel Sperandio v.*

Clymer, 568 S.W.2d 935 (Mo. 1978); *A. L. Black v. Acme Markets, Inc., supra.* In *Black* the Fifth Circuit referred to its decision in *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969) and noted that "because the wrongful act outside Texas produced reasonably foreseeable harm within Texas, personal jurisdiction was proper." 564 F.2d at 686. Jurisdiction of a nonresident defendant who has caused a consequence within the forum state meets due process muster if the following three questions are answered in the affirmative:

> Did defendant purposefully avail itself of the privilege of acting in Texas or *causing a consequence there*? Did the cause of action arise from such activities? Do such activities "have a substantial enough connection with . . . [Texas] to make the exercise of jurisdiction over defendant reasonable?" (Emphasis supplied).

Southern National Bank v. TriFinancial Corporation, supra, at 1191. This three-pronged test was applied by the Sixth Circuit in *Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968), a declaratory judgment action based upon patent rights. The court declared that an economic impact upon the plaintiff in the forum state, reasonably foreseeable by defendants, supplied the requisite "consequence" to confer *in personam* jurisdiction.

> Today, it can no longer be doubted, if it ever was, that the doing of an act or the causing of a consequence in the forum state by the defendant can satisfy the requirements of the "minimum contacts" test. (notes omitted)

Id. at 380.

Appellants argue that this Court's decision in *Kulko v. Superior Court*, 436 U.S. 84 (1978), renders the "effects" test inapplicable to the instant case because the effects test is to be applied only where the defendant derives a benefit

from his activities relating to the forum state. But the question of whether the defendant derived a benefit from his contacts with the forum state is merely one way to determine whether he undertook any purposeful activities with a connection to that state. This Court states in *Kulko* "we cannot accept the proposition that appellant's acquiesence in [his daughter's] desire to live with her mother conferred jurisdiction over appellant in the California courts in this action." The fact that he received no benefit merely indicated that his acquiesence did not constitute purposeful activity. Such "acquiesence" is vastly different from Appellants' purposefully conducting regulatory activities beyond the boundaries of their state. It is also paradoxical that Appellants contend that they received no benefit from their activities relating to Texas, Appellants' Brief at 50, and at the same time assert that they have a "property right" to exercise their statutory obligation to enforce Idaho law. Appellants' Brief at 44. Nevertheless, the receipt or expectation of a benefit from one's activities with the forum state is merely an indicator of the purposefulness of his activity rather than a prerequisite for the applicability of a "consequences" test.

Relying on the restraint of personal freedom of the plaintiff which was caused in Wisconsin by the use of the FBI's NCIC information system by government officials residing in Louisiana, the district court in *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975), *supra* at 41, determined that personal jurisdiction over the nonresident officials depended upon their "contacts" with Wisconsin irrespective of whether they received any economic benefit from their contacts with the forum.

> Defendants' position that the long-arm statute is inapplicable is based on their contentions that the statute

> was not intended to apply to the use of the NCIC system by police and prosecutors, and that the "contacts" with Wisconsin were initiated for the purpose of enforcing Louisiana's criminal laws rather than for the defendants' economic self-benefit.
>
> This position must be rejected. Although the Wisconsin legislature may not have contemplated the application of the long-arm statute to the facts alleged in this action, in the absence of any statutory provision or legislative history forbidding the statute's application, and so long as the facts are within the statute's language, the novelty of the factual situation is not a sufficient basis for ruling that the long-arm statute is inapplicable. Moreover, nothing in the long-arm statute makes the motive for a defendant's activities determinative of the statute's application. If the defendants' actions fall within the language of the long-arm statute, and if they constitute sufficient "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), then personal jurisdiction may be exercised over them.

Id. at 767.

c.

Personal Jurisdiction Was Reasonable Because of the Substantial Connection Of Appellants' Activities With Texas.

Appellants argue that this Court's recent decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977) proscribes the assertion of jurisdiction sanctioned by the courts below. But that case did not alter the standards applicable to minimum contacts analysis, it simply applied them in a new context as demonstrated by the very passage Appellants quote in their Brief at 44. In *Shaffer* this Court concluded that the minimum contacts standards of *International Shoe* apply to *in rem* as well

as *in personam* actions. As Justice Marshall, writing for the Court, stated: "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in International Shoe should be held to govern actions *in rem* as well as *in personam*." 433 U.S. at 206. And the result reached was that "we therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." *Id.* at 212. This Court was addressing the propriety of a state court's assertion of jurisdiction based solely on the presence of property within the state. *Id.* at 211. Therefore, it is of no moment whether or not "the effect of the holdings below is, in essence, to affect the property right of elected and appointed officials to exercise their statutory obligation to enforce Idaho law." Appellants' Brief at 44. For *Shaffer* to even address the instant case, that "property right" Appellants claim in their obligation to enforce state law would have to be a property right the situs of which was in Texas and the District Court would have had to assert jurisdiction *in rem* on the basis of the location of that property right. *Shaffer v. Heitner* is wholly inapposite to the case at bar.

Appellants suggest that application of a consequences test to determine their amenability to jurisdiction under due process standards would "cast[ ] a pall over attempts to enforce state laws generally." Appellants' Brief at 46. They pose the following hypothetical situation:

> . . . California officials who applied that state's air quality laws — which impose a higher emission standard than applicable federal law — to automobiles coming into California from any source could be required to appear in federal court in Michigan to defend there a constitutional challenge to the validity of the California laws in an action brought by a Michigan auto manufacturer. Grounds for assertion of Michigan jurisdiction would be that the California laws had a "practical, extra-territorial effect" or "consequences" in Michigan or "amounted to the regulation" of the auto manufacturer's Michigan-based business activities.

Appellants' Brief at 46. This argument fails to distinguish between residual extraterritorial effects of state regulation and the consequences of a state's direct regulation of activities beyond its borders, *see, supra* at 36. California may indeed impose the standards it believes proper and those who would do business *in that state* must meet those standards. The instant case, however, is more analogous to the situation which would be presented if California passed an emission law and required that its provisions be met by all cars sold by Michigan manufacturers to Texas purchasers, and unless the provisions of that statute were met, no sale of the automobiles could be consummated anywhere.

In addition to the effects Appellants caused in Texas, the Deputy Administrator sent to GWU in Texas a letter of comment and Order, see, *supra at 53*, which restrained the commencement of its offer. Because these documents represented the vehicle by which Appellants enjoined the offer, they constituted sufficient minimum contacts with Texas to support personal jurisdiction in this case. As the Fifth Circuit has said:

> Since Travelers Health Ass'n v. Virginia, 1950, 339 U.S. 643 . . . and McGee v. International Life Insurance Co., 1957, 355 U.S. 200 . . . it is established that correspondence alone may establish sufficient contacts with the state to subject a nonresident to a suit in that state on a cause of action arising out of those contacts.

Calagaz v. Calhoon, 309 F.2d 248, 256 (5th Cir. 1962).

The extraterritorial effects of the Idaho Act are consequences of Appellants' enforcement of an unconstitutional state statute. The consequences of enforcement occurred in the Northern District of Texas, GWU's principal place of business. These consequences were reasonably foreseeable by the Appellants and therefore support personal jurisdiction pursuant to the Texas Long-Arm Statute. A state has a vital interest in protecting its citizens where activities conducted out of state injure them within the state. How much greater is the state interest where its citizens are injured by such out-of-state activity and the state's own sovereignty is impugned by a sister state's attempt to enforce its statutes extraterritorially.

V.

VENUE IS PROPER IN THE NORTHERN DISTRICT OF TEXAS PURSUANT TO SECTION 27 OF THE 1934 ACT

Section 27 of the 1934 Act provides that venue lies, among other places, in the district in which any act or transaction constituting the violation of the Act occurred. This provision does not require that the act which occurred in the district constitute the core of the claim. All that is required is that the act within the forum district be more than an immaterial part of the wrongful act. *Jacobs v. Hanson*, [CURRENT] FED. SEC. L. REP. (CCH) ¶96,770 at 95,033 (D. Del. February 6, 1979).

> To establish venue under Section 27, "[i]t is only necessary to show that an act in furtherance of the unlawful plan was committed within the district. . . ." *Wharton v. Roth*, 263 F.Supp. 922, 923 (E.D.N.Y. 1964). *See Hooper v. Mountain States Securities Corporation*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961). The venue-sustaining act need not constitute the core of the alleged violation, *Sohns v. Dahl*, 392 F.Supp. 1208, 1215 (W.D.Va. 1975), nor even be illegal, *Mayer v. Development Corp. of America*, 396 F.Supp. 917, 929 (D. Del. 1975), so long as "it represents more than an immaterial part of the alleged violations." *Sohns v. Dahl, supra*, 392 F.Supp. at 1215.

S-G Securities, Inc. v. Fuqua Investment Co., [CURRENT] FED. SEC. L. REP. (CCH) ¶96,750 at 94,932 (D. Mass. December 19, 1978). That court then concluded that the fact that consequences of the defendants' activities had substantial impact on the operation of the plaintiff corporation's headquarters was sufficient to confer venue in the district where its headquarters was located. *Id.* In *Travis v. Anthes Imperial Limited*, 473 F.2d 515, 529 (8th Cir. 1973), the Eighth Circuit determined that venue in the district court was proper, in part, because "whatever consequences there were in the United States from actions in Canada were felt in [that] district." Similarly, the Fifth Circuit determined, the effects of Appellants' activity were felt by GWU in the Northern District of Texas where its principal place of business is located. Furthermore, the mailing of the Idaho comment letter and Order, *see, supra* at 53, 63, was a substantial act in furtherance of Appellants' restraint of GWU's proposed offer. The receipt of these documents by GWU at its corporate headquarters in Dallas, Texas thus supports the propriety of venue in the Northern District of Texas.

Just as "[i]t is hornbook law that one of the elements of a tort is damage and plaintiffs here have alleged damage within the State of Texas," *A. L. Black v. Acme Markets, Inc.*, 564 F.2d 681, 685 (5th Cir. 1977), the crucial element of the attempted enforcement of an unconstitutional state statute is the restraint and resulting harm to the entity against which it is enforced. Where an act has occurred in the dis-

trict sufficient to support personal jurisdiction, venue is likewise proper. The effects of Appellants' activities in the Northern District of Texas are sufficient to support venue there regardless of whether they were physically present in that district or personally engaged in acts or transactions there. *S-G Securities* at 94, 932; *Warren v. Bokum Resources*, 433 F.Supp. 1360 (D. N.M. 1977); *Hilgeman v. National Insurance Company of America*, 547 F.2d 298, 302 n.11 (5th Cir. 1977).

VI.

VENUE IN THE NORTHERN DISTRICT OF TEXAS WAS PROPER UNDER 28 U.S.C. § 1391(b).

Where subject matter jurisdiction is not based solely upon diversity of citizenship, 28 U.S.C. § 1391(b)[19] is the applicable general venue statute. Wherever compulsory process is available, venue under the general venue statutes should also be proper.

> This equation of the availability of compulsory process on a nonresident and proper venue under § 1391(a) would have three advantages. First, it would minimize the number of instances in which a plaintiff is put to the election of foregoing protections afforded him by a state with sufficient connection with the subject matter to justify it in exercising compulsory jurisdiction over the defendant, or shifting the choice of state or federal forum to the defendant. Second, in cases in which the defendant is sued in an inconvenient forum, it would broaden the choices available under § 1404(a) as interpreted in *Hoffman v. Blaski*. [363 U.S. 335 (1960)]

[19] 28 U.S.C. § 1391(b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

> Third, it would shift the issue in motions for transfer from the largely technical questions of which fact of perhaps many that underlie a claim marks the place at which the claim arose toward the considerations of convenience that underlie the venue concept.

1 J. MOORE'S FEDERAL PRACTICE ¶0.142 [5.-2] at 1430 (2d ed. 1977). The same reasoning applies to § 1391(b). Furthermore, as has been discussed, *supra*, in connection with the applicability of § 27 of the 1934 Act, a claim arises where injury is suffered. "In personal injury actions . . . if it is necessary to choose between the place of injury and the place of the negligent acts or omissions, the place the claim arises should be held to be the place of injury." *Id.* at 1434. As the Fifth Circuit aptly observed:

> The core of Great Western's claim is that the Idaho officials invalidly prevented Great Western from initiating any tender offer for Sunshine. The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint occurred, that place is Dallas. Although the result of Idaho's regulation was that Great Western could not make an offer to Sunshine shareholders who reside in districts throughout the country, the place of restraint, and thus the place where Idaho officials injured Great Western, was in Dallas.

577 F.2d at 1273. Applying a "weight of contacts" test to determine the propriety of venue, *see, Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078 (9th Cir. 1976), venue properly lay in the Northern District of Texas. Appellants' attempt to refute this proposition by arguing that "though the effect on the plaintiff herein was felt in Texas, the acts by the Idaho defendants all occurred in Idaho, and Idaho is the district in which the defendants performed their official duties." Appellants' Brief at 64. But, as has been discussed at length, the key to

the instant case is the fact that Appellants were not performing their official duties in Idaho, as they should, but were acting extraterritorially by their attempt to enforce the Idaho Act. In the closely analogous case of *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975), *supra* at 41, 60, the defendant officials had undertaken action in Louisiana, but the harm was visited upon the plaintiff in Wisconsin. The court stated:

> As used in 28 U.S.C. § 1391(b), "claim" means "the aggregate of operative facts giving rise to a right enforceable in the courts . . ." *Ryan v. Glenn*, 52 F.R.D. 185, 192 (N.D. Miss. 1971). *See, Original Ballet Russe v. Ballet Theatre*, 133 F.2d 187 (2d Cir. 1943); 1 Moore's Federal Practice ¶ 0.142 [5.-2], at 1423-1435 (2d ed. 1974). The operative facts of each of plaintiff's three claims include the presence of the Baton Rouge NCIC entry, an arrest and detention based on the entry, and the subsequent failure of the Baton Rouge authorities to forward extradition papers. While the defendants' alleged acts and omissions occurred in Louisiana, the arrests and detentions occurred in Wisconsin and New York. These injuries are part of the claims plaintiff seeks to litigate.

Id. at 766. The Court upheld venue, as well as personal jurisdiction, over the nonresident officials. Such extraterritorial effect of acts by government officials is precisely the case presented to this Court.

Similarly, the important consideration in the present case is not where Appellants concluded to take the action they ultimately took. The injury of which GWU complained was the application and enforcement of the Idaho Act, not the determination that the Act should apply. In *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R. R. Co.*, 290 F.Supp. 612, 616 (D.Colo. 1968), *aff'd*, 411 F.2d 1115 (10th Cir 1969), the defendants included the National Mediation Board ("NMB"), an executive agency of the Federal Government, and the individual members of the NMB. The court concluded that the claim arose and, hence, venue was proper in the district where the NMB's order had its effect rather than in the district in which it was issued.

> . . . Any claim that might exist against the NMB for injunctive relief should also be considered as arising in this district. Though the particular action which plaintiff seeks to enjoin would be taken in the District of Columbia where the NMB is headquartered, the impact and operation of any such action will be felt in this district and it is here, therefore, that the cause of action arises.

Id. at 616. *See generally*, Comment, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEX L. REV. 392, 403-10 (1976).

The propriety of venue in the Northern District of Texas is underscored by the posture of this case as originally brought. Officials of New York, as well as Idaho, indicated they would assert jurisdiction over GWU's offer. Maryland could not decide the jurisdiction issue without a hearing. Had all three states asserted jurisdiction, there would have been no district in which all defendants resided. Only in the Northern District of Texas, the focal point of the regulatory activity, could the entire controversy be tried in a single suit. The very purpose of the provision permitting suit to be brought where the claim arose was "to assure that at least one venue . . . will be proper as to all defendants . . . in a multi-party action." 1 J. MOORE'S FEDERAL PRACTICE ¶ 0.142 [5-2] at 1434 (2d ed. 1977). And the Fifth Circuit stated:

> There is no reason to conclude that the claim against New York or Maryland arose in Idaho. The district judge would have placed the claim in Idaho only be-

> cause Idaho was the source of the power exerted extra-territorially. Idaho would not have been the source of New York's or Maryland's power. In contrast, if New York or Maryland officials had asserted jurisdiction, the reasons why we believe Great Western's claim against the Idaho officials arose in Dallas would equally apply to them, and a single suit would have been possible.

577 F.2d at 1274.

The extraterritorial enforcement of the Idaho Act injured and restrained GWU in Texas. For purposes of § 1391(b), the instant claim arose in the Northern District of Texas.

VII.

FEDERAL SECURITIES REGULATION PREEMPTS THE IDAHO ACT

The Idaho Act is invalid under the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, § 2. To give effect to the Supremacy Clause (especially in light of the congressional power to regulate interstate commerce), the courts have developed the doctrine of federal preemption. Under this doctrine, when congressional legislation conflicts, either expressly or implicitly, with state regulation, the latter is inoperative. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).

This Court, in *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) has recently summarized the nature of the inquiries to be made to determine whether a state statute is void under the Supremacy Clause.

> The first inquiry is whether Congress, pursuant to its power to regulate commerce, U. S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. [218] 230, 67 S.Ct. 1152, [91 L.Ed. 1446] [1947].
>
> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 339, 404, 85 L.Ed. 581 (1941). Accord, *De Canas v. Bica*, 424 U.S. 351, 363, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971); *Florida Lime & Avocado Growers v. Paul, supra*, at 141, 10 L.Ed.2d 248, 83 S.Ct. at 1217; *id.*, at 165, 10 L.Ed.2d 248, 83 S.Ct. at 1220 (White, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *De Canas v. Bica, supra*, at 363-365, 47 L.Ed.2d 43, 96 S.Ct. 933; *Swift & Co. v. Wickham*, 230 F.Supp. 398, 408 (S.D.N.Y. 1964), appeal dismissed, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), aff'd on further consideration, 364 F.2d 241 (CA 2 1966, cert. denied, 385 U.S. 1036, 87 S.Ct. 776, 17 L.Ed.2d 683 (1967)).

As held by the Fifth Circuit, 577 F.2d at 1271, the Supremacy Clause was incorporated into the 1934 Act by

Section 28(a) thereof,[20] 15 U.S.C. § 78bb, which provides in relevant part:

> Nothing in this chapter shall affect the jurisdiction of the Securities Commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.* (Emphasis supplied).

Thus, the Supremacy Clause is made a statutory as well as a constitutional requirement. Thomas Corcoran, one of the principal draftsmen of the bill which became the 1934 Act, explained that in drafting § 28(a) the intent was to apply well-established principles of preemption:

> The national law drives out all systems insofar as they are inconsistent. That is a situation you always have. A State can legislate additionally to the Federal law, *but it cannot legislate inconsistently with it.*[21]

Appellants boldly assert that Congress reserved to the states under § 28(a) the power to regulate corporate takeover offers in a manner different from that adopted in the Williams Act, and that the states have an inherent power to accomplish such regulation. Appellants' Brief at 66. Certainly, the language of § 28(a), as well as the legislative history of § 28(a), fail to support that assertion. The historical context in which the 1934 Act was adopted further undercuts Appellants' position. At the time the 1934 Act was passed, the Blue Sky movement had spread to 47 states and Hawaii. I L. Loss, SECURITIES REGULATION at 30 (1961). This Court had upheld the constitutionality of state Blue Sky laws on the express ground that they operated only

[20] *Accord:* E. ARANOW, H. EINHORN AND G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL at 225 (1977).

[21] HEARINGS ON S. RES. 84 (72d CONG. AND S. RES. 56 AND S. RES. 97 (73d CONG.), PT. 15, BEFORE THE SENATE COMM. ON BANKING AND CURRENCY ON STOCK EXCHANGE PRACTICES UNDER THE NATIONAL SECURITIES EXCHANGE ACT OF 1934, 73d Cong., 1st Sess. 6577 (1933).

within the state. Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); and *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917). This trilogy of cases is cited by Appellants to support their observation of "this Court's long-standing recognition of the propriety and constitutionality of the co-existence of federal and state securities regulation." Appellants' Brief at 68. Appellants' statement needs refinement; this Court recognized the rights of the states under their police powers to protect their citizens from abuse in securities transactions within their state borders, and the courts have consistently recognized that state securities laws have no extraterritorial application.[22]

Section 28(a) reserved to the states their traditional role in the regulation of intrastate securities transactions, at a time when there was no federal or state regulation of cash tender offers.[23] Congress adopted the Williams Act in 1968 in response to the utilization of the interstate cash tender offer as a corporate acquisition technique. Prior to that time, there was little federal or state regulation of the field.[24]

[22] *See, supra,* note 14 and accompanying text.

[23] Congressional intention to preempt any state attempt at extraterritorial regulation of securities is further manifested by Section 18 of the 1933 Act, 15 U.S.C. § 77r, which preserved State Securities Commission regulation over the issuance of new securities — the subject of the 1933 Act. The House Committee Report on the 1933 Act stated: "The bill carefully preserves the jurisdiction of state security commissions to regulate transactions *within their own borders.* [H. Rep. No. 85, 73d Cong., 1st Sess., p. 10 (1933) (Emphasis supplied)]."

[24] The paucity of federal and state regulation over the conduct of cash tender offers prior to the adoption of the Williams Act is discussed in Pitt, *Standing to Sue Under the Williams Act after* Chris-Craft: *A Leaky Ship on Troubled Waters,* 34 BUS. LAW. 117, 125-27 (1978). The absence of state regulation of tender offers also demonstrates that this is not a case as Appellants contend in which the Court is asked to "federalize" what has traditionally been a matter of state law. In this case, Idaho seeks to disturb the effects of federal regulation adopted some seven years prior to the effective date of the Idaho Act.

The Williams Act was designed to assist investors confronted with a cash tender offer in making an informed decision about whether to tender their shares. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); *Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 188 (1967) ("*Senate Hearings*"). The Senate Report reflected the prior "gap" which had existed in the federal securities laws.

> The bill [S. 510] would correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide for full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly-held companies.[25]

When the Williams Act was passed, only Virginia had a state takeover statute, which became effective March 5, 1968, only a few months prior to the effective date of the Williams Act. Va. Code Ann. §§ 61-4-1 to 13 (Cum. Supp. 1977).[26]

Although the Williams Act contained no express preemption provision, since it was passed as an amendment to the

[25] S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1976). *See also*, Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L. J. 510, 512 (1979); Sowards and Mofsky, *Corporate Take-Over Bids: Gap in Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499 (1967).

[26] As noted by the Fifth Circuit, 577 F.2d at 1275 n.39, there is no mention of state legislation in the Senate or House hearings on the Williams Act. Because the state takeover statutes are not of substantially the same character as the Blue Sky laws Congress intended to save, § 28(a) may not have saved to the states any power, even intrastate, over cash tender offers. *See*, Langvoort, *State Tender Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. REV. 213, 249 (1977); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 212-15 (1959); Hirsch, *Toward a New View of Federal Pre-Emption*, 1972 U. ILL. L. F. 515, 540-41 (1972).

1934 Act it acquired § 28(a)'s prohibition of conflicting state securities regulation. Section 28(a) cannot be read as a reservation to the states of the power to regulate corporate takeover offers *extraterritorially*, if at all. For example, Congress in adopting the McCarran-Ferguson Act, 15 U.S.C. § 1011, expressly left the regulation and taxation of insurance to the states. In *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451 (1962), the only contacts with Texas were insured property located in Texas and doing business by the insured in Texas. All other aspects of the issuance of insurance policies and the conduct of the insurance transaction took place outside of Texas. This Court held that the State of Texas could not collect a tax on insurance premiums arising out of the transactions, thus striking down an attempt by a state to regulate insurance *extraterritorially*, even though the McCarran Act expressly provided for state regulation of the business of insurance.

In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), a Pennsylvania sedition statute proscribed sedition against either the government of the United States or the government of Pennsylvania. The defendant was convicted of sedition against the United States. This Court held that the state statute was preempted by the federal Smith Act, notwithstanding a general congressional expression not to supersede state criminal statutes. *Id.* at 501, n. 10.

Just as Appellants cannot demonstrate any reserved or inherent power to regulate an interstate cash tender offer extraterritorially, Appellants also can find little comfort in the decisions of this Court allowing state statutes to stand where the subject matter involved had been traditionally state-regulated. Thus, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), a state smoke abatement

statute withstood a preemption claim because of the traditional state authority to regulate for the protection of the health of its citizens. In *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), a state statute withstood attack on preemption grounds where the state was exercising its traditional control over the distribution and retail sale of food in the interests of its local consumers. In *Kewanee Oil Co. v. Bicron*, 416 U.S. 470 (1974), long-standing state protection of trade secrets was allowed to continue to exist concurrently with the federal regulation of patents. The record before this Court is entirely different. The recent proliferation of state takeover statutes has been a reaction to pre-existing federal regulation in a field in which, prior to 1968, neither Congress nor the state legislatures had attempted to regulate at all.

Nor can Appellants find succor in this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973), where state statutes governing wage disputes were held not to interfere with federal policy for the protection of investors. Here, the Idaho Act runs directly afoul of federal policy for the regulation and administration of interstate cash tender offers, and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." It is, therefore, preempted by operation of § 28(a)'s restatement of the Supremacy Clause.

1.

In the Adoption of the Williams Act Congress Struck a Careful Balance By Regulating Tender Offerors and Target Management Evenhandedly

Congress, in passing the Williams Act amendments, adopted a policy of absolute "evenhandedness," dictating that neither the target company nor the tender offeror

would be favored. "Congress was indeed committed to a policy of neutrality in contests for [corporate] control. . . ." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977). The intended beneficiaries of this congressional legislation were the target company shareholders who could best be served by a policy of strict neutrality which gave advantage to neither the incumbent management of the target company nor the tender offeror. *Rondeau v. Mosinee Paper Corp., supra*, at 58-59 (1975). Jeffrey B. Bartell, at the time of trial a Commissioner of Securities for the State of Wisconsin, testified that Senator Williams and other draftsmen of the Williams Act "felt it was important to equalize the balance between offeror and target company by providing a regulatory scheme pursuant to which the shareholders would ultimately benefit." (A. 223). Francis Wheat, a former Commissioner of the SEC, testified on behalf of Appellants to the same effect. (A. 271 to A. 272).

The Williams Act reflects a congressional policy to regulate, not eliminate, tender offers. During the course of extensive hearings, Congress recognized that takeover bids frequently serve a "useful purpose in providing a check on entrenched but inefficient management." H. R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968); *see, e.g., Senate Hearings at* 114-19, 136-39, 165-75. Congress concluded that the Williams Act should be implemented in such a manner so that "takeover bids should not be discouraged" S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

In implementing the Williams Act, the courts have carefully maintained the congressional policy of equal treatment of the competing parties.

> *The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids to prevent large accumulations of stock which would create the potential for such attempts.* Indeed,

> the Act's draftsmen commented upon the "extreme" care which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." (Emphasis supplied, notes omitted).

Rondeau v. Mosinee Paper Corp., supra, at 58-59.

> Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders.

Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947-48 (2d Cir. 1969).

Thus, the Williams Act, adopted for the purpose of protecting shareholders, operates in a fashion which is neither pro-management nor pro-tender offeror.

2.

The Intent of Congress to Strike a Regulatory Balance is Reflected in the Legislative History of the Williams Act

Pre-effective Filing. In 1965 Senator Harrison Williams introduced the first legislative proposals for regulation of tender offers as such. His initial bill would have imposed far more onerous burdens on the offeror than the legislation Congress ultimately enacted. Any person making an offer which, if successful, would have resulted in ownership of *more than 5%* of the stock of the target corporation would have been required to file certain information *with the target company* and with the SEC *20 days in advance* of the offer to shareholders. S. 2731, 89th Cong., 1st Sess. (1965); *cf.* H.R. 14417, 89th Cong., 2d Sess. (1966). The SEC submitted

a memorandum to the Senate Banking and Currency Committee critical of this approach, and suggested instead that an offeror be required to file a confidential statement[27] with the SEC five days before the offer was to be made to shareholders. 112 Cong. Rec. 18170-71 (1966). No action was taken on the proposal in that session.

Senator Williams subsequently introduced a bill (S. 510) in the 90th Congress following the SEC's recommendation. His introductory remarks stressed points which are vital to an understanding of the legislation which became the Williams Act:

> This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholder and employee, and in a few severe situations, it may be necessary if the company is to survive.
>
> I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror.

113 Cong. Rec. 854 (1967).

Notwithstanding these assurances, the bill's congressional sponsors and the SEC met with some opposition in Congress. Representatives of the New York Stock Exchange and the American Stock Exchange testified at length. *Senate Hearings* at 69-106. They expressed concern that the 5-day advance filing with the SEC could result in leaks which would

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[27] The Williams Act from its earliest drafts required disclosure of the very items in Section 13d(1) which applied at the time GWU announced its proposed tender offer.

be extremely disruptive to the securities market and destructive of tender offers:

> Any legislation that increases the chances of premature disclosure of an impending offer can only serve to thwart the use of tender offers. These offers may be of great benefit not only to the stockholders whose stock is being sought, but to those of the company making the offer.

Id. at 72.

The bill also was criticized by a panel of professors for placing unwise and undue burdens on tender offers, which they regarded as useful devices in ousting inefficient management. *Senate Hearings* at 117-128.[28]

Reflecting the force of these arguments, the bill, as reported out of Committee, did not contain the 5-day advance filing provision. As enacted in the summer of 1968, the Williams Act contained no requirement whatsoever that an offeror make disclosure to any government agency in advance of the offer to shareholders.[29]

This idea of advance notice, however, did not die, at least in the minds of its advocates. In January of 1969, Congressman Monagan introduced a bill to amend the Williams Act to require a 30-day advance filing with the target company and the SEC. 115 Cong. Rec. 1578 (1969). This was briefly considered in committee, but rejected in the course of consideration of the 1970 amendments to the Williams Act. By that time, the SEC no longer supported the idea of advance filings. The experience of the intervening years must have proved to the SEC that the existing regulation of tender offers was adequate to the task.[30] This legislative history shows that Congress, out of concern over the detrimental effect on the marketplace, specifically rejected on more than one occasion the notion that information about the nature and plans of one proposing a tender offer must be filed in advance of the offer with a regulatory agency.

Prior Agency Approval. In the face of claims by the Chairman of the SEC in favor of the utility of prior Commission review of tender offer disclosure statements, Congress specificially rejected a proposal that approval by a regulatory agency of tender offer disclosures be required prior to their circulation to shareholders. The interest to be served by providing an opportunity for an agency to screen for mistakes or inadequate disclosures was deemed to be outweighed by the problems created by advance filings.[31]

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[28] The usefulness of the tender offer as a device to oust inefficient management is frequently stressed in the legislative record. *See, e.g.*, 113 Cong. Rec. 854-55 (1967); *Senate Hearings* at 91, 165-73; 113 Cong. Rec. 24665 (1967).

[29] The House also rejected a bill substantially identical to the original S. 510 although the Chairman of the SEC again appeared before a Congressional Committee to urge that the requirement of advance filing with the Commission be made part of the tender offer legislation. *Takeover Bids: Hearing on H. R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong. 2d Sess. 17 (1968).

[30] *Hearings on H. R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 21 (1970). Again in 1976, in the context of hearings with respect to possible conflicts of interest and bank financing of tender offers, SEC Commissioner Loomis was questioned about the advisability of a 60 or 120-day waiting period between the time of announcement and completion of the tender offer. He discussed the history of the 5-day waiting period at the time the Williams Act was enacted in 1968, and said that the person making the offer would most likely be unwilling to specify his price 60 days in advance since the market for the target stock might go up or down during this period. *Corporate Takeovers: Hearings on Regulation under Federal Banking and Securities Laws of Persons Involved in Corporate Takeover Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 113 (1976).

[31] *See* S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1976); *Senate Hearings* at 72-75; 87-89, 98, 105, 139-140, 151, 163, 245. *See also*, Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149, 152-53 (1966).

Disclosure Requirements. Legislative history demonstrates that the disclosures required by the Williams Act were, by intent, "really very simple" and limited to "just the sort of disclosures that would be most meaningful and important to the shareholders" and "shall not constitute any great burden." *Senate Hearings* at 205 (Testimony of SEC Chairman Cohen). Within this framework, the Williams Act only requires disclosure of that information Congress and the SEC thought necessary, adequate and relevant. Schedule 13D does not require detailed financial and background information about the offeror as would a registration statement filed under the 1933 Act.

A federal court has recently commented on the biased effect a requirement of a full 1933 Act registration statement would have on tender offers. In *Interstate Brands Corp. v. DPF, Inc.*, 75 Civ. 417-W-4 (W.D. Mo. June 23, 1975), the target corporation argued that financial information concerning the offeror should have been disclosed. In rejecting the argument, the court pointed out that requiring full financial information from the offeror would be inconsistent with Congress' intention "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the take-over bid." The Court stated:

> It is apparent that there is an abundance of information concerning the offeror corporation's "qualifications" which might be of some secondary concern to the shareholders faced with a tender offer. Neither the Williams Act nor the regulations of the Securities and Exchange Commission require that information to be disclosed in a tender offer. To require in this case by the issuance of an injunction, that the Defendant make disclosure of the mentioned information would provide management with a tool of temporarily or permanently

> blocking any tender offer which did not give a complete history of the offeror corporation, as it is obvious that an imaginative management wishing to block an offer could determine some aspect that the offeror's "qualifications" which might be of some secondary concern to a shareholder. Such a result could not, in the opinion of the Court, be in accordance with the intent of Congress, and would decidedly tip the balance of regulation in favor of management.

Id. at 16.

Target Company Regulations. The Williams Act provides that the SEC may prescribe rules to regulate any solicitation or recommendation to shareholders by target management, and, by Regulation 14d-4, 17 C.F.R. § 240.14(d)-4, has required that Schedule 14D with certain disclosures be filed prior to target management recommendations.

Finally, the Williams Act provides for no exemption from regulation if a tender offer is recommended by target company management.

The opinion of the Fifth Circuit examines much of this legislative history of the Williams Act (J.S. App., A-38 to A-40), and also describes congressional reaffirmance of the "market approach" to investor protection under the Williams Act, the importance of legal neutrality between the competing parties and the view that regulatory provisions producing more than minimal delay could upset that neutrality, as expressed by Congress in its consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a). (J.S. App., A. 41 to A. 42).

3.

The Idaho Act Destroys the Careful Balance Struck by the Williams Act

The Idaho Act conflicts with and upsets the neutral balance carefully struck by Congress. This conflict is particularly intolerable because the Idaho Act erects several barriers to tender offers that Congress expressly rejected when it enacted the Williams Act.

In conflict with the balanced federal regulatory scheme, the Idaho Act is biased against the tender offeror in favor of target management. The Idaho Act calls for pre-effective publication, disclosure and filing of the proposed offer, prior governmental clearance by Idaho, an extensive pre-effective hearing procedure which the Director or the target company may invoke no matter how trivial the grounds may be, extensive disclosure of information about the offeror that is of marginal relevance to an investor's decision to take cash for some or all of his stock, and less stringent regulation of, and even an exemption for offers recommended by, target management.

Idaho has attempted to regulate cash tender offers by adopting specific forms of regulation previously rejected by Congress. Where Congress expressly rejects a specific form of regulation, such rejection is as sufficient to preempt a state statute that adopts the course rejected as is affirmative enactment of federal legislation that conflicts with the state legislation. In *New York Central R. R. Co. v. Winfield*, 244 U.S. 147 (1917), for example, this Court held that a state workmen's compensation statute permitting strict liability recovery for injury had been preempted by the Federal Employer's Liability Act which provided for liability for negligence only. The federal statute did not, in terms, prohibit a strict liability approach. Nevertheless, this Court found the state statute preempted because it found that Congress had considered, and had rejected, a strict liability approach.

In *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), Congress, through the adoption of the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 ("FPLA") determined to regulate federal labeling requirements on flour packages by allowing weight variations which were due to a loss of moisture during the course of good distribution practice. The application of § 12211 of the California Business & Professions Code, also regulating weight-labeling, did not permit such variations. This Court held that although the state law was not preempted by the express terms of the FPLA, because it would be possible to comply with the state law without triggering federal enforcement action, nevertheless, under *Hines v. Davidowitz*, 312 U.S. 52 (1940), the enforcement of the state law prevented the accomplishment of the objectives of Congress to allow such variations, and the state law was preempted.

The Fifth Circuit in this case properly analyzed *Jones* as holding that although no preemption was established where compliance with state law would not automatically trigger federal enforcement action, nevertheless, preemption was found under the *Hines* test because the state law interfered with the federal regulatory scheme.[32]

[32] It is respectfully submitted that Appellants have misread *Jones* and the analysis of it by the Fifth Circuit. At page 77 of their Brief, Appellants state:

> Moreover, as the circuit court pointed out, state law was preempted by *Jones* only because "compliance with state law would automatically trigger federal enforcement action. . . ."

Appellants then argue that there is no federal enforcement triggered by compliance with the Idaho Act and, therefore, no preemption. The Fifth Circuit did not point out, as claimed by Appellants, that state law was preempted in *Jones* only because of the automatic triggering of a federal enforcement action, but correctly pointed out just the reverse, and that preemption was then found under the *Hines* standard. 577 F.2d at 1275, n. 39.

In *Hines v. Davidowitz, supra,* this Court applied the doctrine of preemption to a "conflict" between federal and state statutes that parallels in many respects the conflict between the Williams Act and the Idaho Act. The federal statute was the Alien Registration Act of 1940, the requirements of which were much less stringent than a state alien registration act. This Court found that Congress had consciously decided not to take the stringent measures contained in the state statute, but to "steer a middle path." *Hines* at 73. Even though the federal scheme could have been more stringent, it was "complete" thus precluding the state from adding to it. This Court stated:

> And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, *or enforce additional or auxiliary regulations.*

312 U.S. 66 (Emphasis supplied). Finding that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," this Court struck down the state statute.

The provisions in the Idaho Act for advance notice and the ability they give target company management to delay the commencement of an offer by the mechanics of agency approval and the pre-effective hearing procedure confer overwhelming practical advantages on an unfriendly incumbent management. Most commentators agree that the single most effective weapon available to a target company resisting a

tender offer is time.[33] With the delay occasioned by the operation of the state law, the target company management under the Idaho Act, and similar state takeover laws, may (a) repurchase its own securities, (b) induce friendly third parties to make open market purchases of the target company securities, (c) announce dividend increases or stock splits, (d) issue additional shares of stock, (e) introduce possible antitrust considerations, (f) arrange a defensive merger, (g) enter into restrictive loan agreements, or (h) reincorporate in or transfer assets to a state, like Idaho, having a restrictive takeover law for the protection of existing management.[34]

Incumbent management of the target company can use the delay to further their own self-interest. Mr. Bartell was aware that it is not infrequently the case in negotiations between the target company and the offeror that the incumbent management wants job security or other emoluments in order to "buy" their recommendation of the offer, which, if given, deprives the state administrative agency of any jurisdiction over the offer.[35]

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[33] *See,* E. ARANOW AND H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL, 223 (1973); AUSTIN AND FISHMAN, CORPORATION IN CONFLICT: THE TENDER OFFER, 127 (1970); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency,* 62 CORNELL L. REV. at 238 (1977); Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 FORDHAM L. REV. 1, 9 (1976).

[34] See, E. ARANOW AND H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL at 235, 242-268 (1973); E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra,* at 196-97.

[35] If investor protection were the primary concern of the Idaho Act, it should apply to all tender offers, not just to those which are contested. Indeed, target shareholders may need the assurance that full and fair disclosure has been made in the environment of the "friendly" tender offer. *Accord,* E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra,* at 224-27.

Appellants would continue to urge that the time periods of the Williams Act do not provide an adequate period of time during which target company management can honestly evaluate a tender offer and advise their shareholders. Appellants' Brief at 69. Mr. Wheat testified that whether the delay period be pre-offer or post-commencement, a sufficient delay period would be 30 days. When Mr. Wheat gave that testimony, on May 24, 1977, GWU's proposed interstate cash tender offer had already been delayed by the Idaho Director for approximately two months. (A. 277 to A. 278).

The record further shows that built-in delay procedures of state takeover statutes may not be in the best interests of shareholders. The mere potential for delay may inhibit an interstate cash tender offer from ever being made. Mr. Bartell testified that the presence of state takeover statutes still has a significant deterrent effect. (A. 207). Mr. Wheat candidly testified that the state statutes, as they presently appear, do, in fact, have a tendency to deter some tender offers. (A. 274). The financial loss to shareholders who were never given the opportunity to tender their shares for cash at a premium is incalculable.

Moreover, delay provided by state takeover statutes does not necessarily guarantee an increase in price.[36] Mr. Bartell testified that the offeror has raised the price in instances in which no state takeover statute applied and, further, that the delay brought about by takeover statutes is not necessarily related to any increase in the price of shares. One of

[36] In this case delay and the attendant cost worked to the disadvantage of Sunshine's shareholders. GWU's initial offer on a "friendly" basis was $16.75 per share, which was not accepted by Sunshine management. *Supra*, note 8. The proposed $15.75 per share offer was reduced to $14.75 per share on August 11, 1977. Wall St. J. (Eastern ed.), August 11, 1977, at 10, col. 1. The settlement was for $15.00 per share. *Supra*, note 1.

the strategies employed by a tender offeror when the proposed offer is regulated by a state takeover statute could very well be to make a lower opening bid than it otherwise would in anticipation that the price would have to go up in order to achieve a successful tender offer. (A. 228). Therefore, any increase in benefits to shareholders as a result of delay imposed by a state takeover statute may be illusory and occasioned only by the pricing strategy of the tender offeror.

Delay imposed by a state takeover statute may actually harm target company shareholders. According to Mr. Guest, the longer a tender offer is delayed, the more expensive it becomes for the tender offeror and the target company to pursue the effort, and the tender offeror may finally come to the conclusion to abandon the effort and seek another opportunity. (A. 148 to A. 149). (*E.g.*, Congoleum Corporation's proposed offer for Universal Leaf Tobacco Company was withdrawn after 8 months of delay and no decision under the Virginia statute. Richmond Times Dispatch, June 10, 1977).

The Idaho Act upsets the balance established by the Williams Act in other respects as well. The disclosures required by the registration statement filed pursuant to § 30-1503 go far beyond the disclosures which Congress and the SEC deemed necessary and relevant for shareholders to make an informed decision as to whether to take cash for all or some of their stock. Detailed financial and background information about the tender offeror, for example, may only tend to create a fertile ground for litigation and to obscure the really material information needed by a shareholder to make his investment decision, serving no useful purpose but additional delay and obstruction.

As stated by the authors in E. ARANOW, H. EINHORN and G. BERLSTEIN, *supra*, at 219-20:

> The disclosures required in most tender offer statutes are much more extensive than those required by the Williams Act. Nevertheless, they probably are of little benefit to the shareholders, for the information required to be disclosed may not be significant to them, and may obscure the relevant disclosures. However, the disclosure statutes do provide vastly increased opportunities for target managements to find fault with the disclosures made by tender offerors and to obtain injunctions against those offers. Full compliance with the federal disclosure requirements is at times difficult enough, even for those tender offerors who make good faith efforts to anticipate and disclose all the information that the courts might find material. Compliance with the state statutes is even more difficult. Regardless of the ultimate success of a target's objections to the accuracy and sufficiency of disclosure by an offeror, the statutes provide numerous opportunities for the target to challenge and thereby delay the offer.

Mr. Wheat concurred, testifying that state takeover statutes have gone too far in requiring a massive amount of disclosure comparable to Form S-1 which he did not think was desirable or necessary. (A. 277).

The congressional balance is further upset by the manner in which the Idaho Act regulates the target management as opposed to the tender offeror. Under § 30-1504, the target management, unlike the tender offeror, need not make any advance filing of its solicitation materials with the Director or the tender offeror, and is not required to meet any specific statutory disclosure standards. The target company's solicitation materials are only subject to the restriction that they not contain any false statement of a material fact or omit to state a material fact necessary to make the statement

therein not misleading. The Idaho Act gives to the target management the power to exclude the offer from state regulation by recommending its acceptance, § 30-1501(5)(e), in which event the offeror's information does not even have to be disclosed to the target company's shareholders. This stands in stark contrast to the regulation of the tender offeror and target management in *all* tender offers governed by federal law and to the restrictions imposed on target management by federal law.[37]

Finally, the Idaho Act operates in other respects to frustrate the means chosen by Congress for shareholder protection. For example, the advance newspaper announcement required by § 30-1503 not only conflicts with the basic administration and regulation of cash tender offers under the Williams Act, but may discriminate against target company shareholders around the country who do not subscribe to the newspaper in which the publication is placed. Moreover, under § 14(d) of the 1934 Act, a tender offer commences when it is first published, sent or given to security holders. At that point, the time periods begin to run for the withdrawal of tendered shares and the proration of shares tendered early in a partial offer. Under the Idaho Act, these time periods begin to run only when the offer is declared effective by the Director. § 30-1506(2) and (3). The pre-commencement publication in Idaho may, therefore, start the tolling of substantive federal rights of withdrawal and proration. Pre-effective publication, advance notice and hearings may cause premature activity in the national marketplace, whereby open market purchases of target company

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[37] *See, e.g.*, Rule 13e-1, 17 C.F.R. § 240.13e-1 (1977), limiting the ability of a target corporation to repurchase its own shares during a tender offer, and Rule 14d-4, 17 C.F.R. § 240.14d-4 (1977) imposing disclosure requirements on incumbent managers who wish to recommend that shareholders accept or reject a tender offer.

stock by arbitrageurs and others may drive the price up toward the proposed tender offer price and reduce target company shareholder incentive to tender their shares. *See, generally*, E. ARANOW and H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL at 173-91 (1973).

E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra*, at 227-29 have concluded:

> The Williams Act was deliberately designed to avoid favoring either the tender offeror or the management of the target. Congress specifically considered and rejected pre-effective filing and clearance of tender offer materials because of the impact of such procedures upon the market and upon tender offers. Furthermore, the Supreme Court has ruled that tender offers may be enjoined only upon a showing of irreparable harm.
>
> In contrast, the state pre-effective filing and clearance requirements give substantial advantages to the target's management if it wishes to defeat an announced tender offer. These requirements permit the tender offer to be delayed without a showing of irreparable harm, or even of violation of the state statutes. Consequently, they give the management the opportunity to persuade shareholders to reject the tender offer before the offeror has had the opportunity to solicit their shares. . . . In addition to the conflicts previously discussed, the state statutes, because of their purported extraterritorial applicability, present to the tender offeror a mass of conflicting requirements, making compliance difficult, if not impossible, even for the best-intentioned offeror. The suggested use of conflict of law principles can do little to lessen the difficulties of noncompliance. The application of conflicts rules is uncertain, and does not eliminate the possibility that conflicting determinations will be reached by courts of different states. In any event, judicial resolution of such issues raised by each tender offer cannot be accomplished without a substantial delay.
>
> For these reasons, the authors believe that, logically, state tender offer statutes are and should be preempted by federal legislation. It appears that the harm caused by the state statutes' disruption of the securities market, and of the orderly regulation of tender offers, far outweighs the benefits to be derived from state tender offer statutes.[38]

As discussed by the Fifth Circuit, the congressional approach to the regulation of cash tender offers was a market approach under which investors would make their own decisions while tender offeror and target management were regulated evenhandedly. The Idaho approach was a fiduciary one, under which the scales were tipped in favor of target management in reliance upon their fiduciary responsibilities to investors. The destruction of the neutral balance struck by Congress causes the Idaho Act to stand as an obstacle

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[38] In *Dart Industries, Inc. v. Conrad*, IP78-709-C (S.D.Ind. Nov. 17, 1978), the District Court held that the Delaware Tender Offer Act, Del. Code Ann. tit. 8, § 203, *et seq.*, was preempted by the Supremacy Clause and unconstitutional under the Commerce Clause. In an earlier stage of that litigation, the court found the Indiana Business Takeover Act, Ind. Code §§ 23-2-3-1, *et seq.*, to be null and void on preemption and constitutional grounds. *Dart Industries, Inc., v. Conrad*, IP78-709-C (S.D.Ind. Nov. 10, 1978).

In *Daylin, Inc. v. Uarco, Inc.*, 78 C 4246 (N.D.Ill. Nov. 27, 1978), the Illinois Business Take-Over Act was enjoined on constitutional grounds. To the same effect was the injunction order in *Mite Corporation v. Dixon*, 79 C 200 (N.D.Ill. Feb. 2, 1979).

In the Occidental Petroleum Corporation offer for Mead Corporation, the Federal District Court of the Southern District of Ohio expressed grave doubt as to the constitutionality of the Ohio takeover statute, Ohio Rev. Code Ann. § 1707.041, Case C-2-78-1100, unpublished opinion, November 7, 1978.

The constitutionality and enforceability of the Massachusetts Takeover Act, Mass. Gen. Laws Ann. ch. 110C, § 1, *et seq.*, is under challenge in *Tyco Laboratories, Inc. v. Connelly*, CA 79-265 T (D.Mass., Feb. 9, 1979).

to the accomplishment and execution of the full purposes and objectives of the Williams Act. 577 F.2d at 1279-80.[39]

4.

The Pervasive Federal Regulation of Interstate Cash Tender Offers Preempts the Idaho Act

Federal law preempts a state statute whenever a scheme of regulation, created by federal legislation and implemented by a federal administrative agency charged with responsibility for enforcing the regulatory scheme, is so pervasive that no room has been left for state law to provide supplemental regulation. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

The addition of the Williams Act amendments to the 1934 Act and the delegation to the SEC of authority to promulgate rules and regulations created a comprehensive legislative scheme for the regulation of virtually every aspect of transactions in outstanding securities, including purchases and sales pursuant to cash tender offers. Pursuant to its dele-

[39] Senator Williams has written "[a]dvance notice provisions, and requirements concerning the duration of offers, the prorata purchases of shares, and the withdrawal rights of shareholders either explicitly conflict with federal provisions on the same subjects or are obstacles to the accomplishment of objectives implicit in the federal statutes." H. WILLIAMS, INTRODUCTION TO DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL xix (1977).

gated authority, the SEC promptly promulgated rules and regulations for the implementation of the Williams Act.[40]

The 1934 Act, including the Williams Act amendments, the rules and regulations promulgated by the SEC pursuant to its rule-making powers, and the myriad federal court cases construing the Williams Act constitute an extensive system of federal regulation of interstate cash tender offers. Inconsistent state action cannot be permitted to impede or frustrate the congressional design for the regulation of such offers. In view of a clear congressional intent to occupy this field of regulation, any state law which interferes with or precludes the operation of the federal regulatory scheme necessarily conflicts with the provisions of the 1934 Act and is, therefore, invalid.

This conclusion is supported by decisions concerned with other federal regulatory schemes which have been held to preclude state interference. In *City of Burbank v. Lockheed Air Terminal, Inc., supra*, a municipal airport curfew imposed to reduce local noise was preempted and, therefore, invalidated by a "comprehensive scheme of federal control" of airport noise involving the Federal Aviation Administraton and the Environmental Protection Agency. In *Burbank*, the fed-

[40] *E.g.*, 17 C.F.R. § 240.13d-1 (1968), describing the information to be furnished to the SEC by a tender offeror; 17 C.F.R. § 240.14d-1(a) (1968), describing the information to be furnished to target company shareholders by the tender offeror; 17 C.F.R. § 240.14d-4 (1968), describing information to be filed with the SEC by a target company tendering for its own shares or attempting to persuade its shareholders to either accept or reject the tender offer. On February 5, 1979, the SEC published for comment Proposed Rules and Schedule for regulating conduct relating to tender offers for the protection of investors. SEC Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 (17 C.F.R. Part 240). These proposed regulations state, at page 2, that they are a part of the SEC's on-going program to replace its emergency rules under the Williams Act with a comprehensive regulatory framework with respect to tender offers.

eral statute did not by its terms preclude local enforcement of municipal ordinances against local airport noises. Nevertheless, this Court found that the "pervasive nature of the scheme of federal regulation of airport noise" compelled the conclusion that state or local actions were preempted. 411 U.S. at 633. This Court stated, quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944),

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls.

411 U.S. at 633-34.

Federal control over the regulation of the securities markets, including the purchase and sale of securities in the context of cash tender offers, is no less "intensive," "elaborate" and "detailed" than federal control over aviation.

Where the federal government has reached a balance which satisfies the "needs of the subject matter without disproportionate burden on the regulatees, the balance struck is not to be upset by the imposition of higher local standards." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 171 (1963) (White, J. Dissenting). Thus, the Supremacy Clause forbade efforts by a state to afford patent protection to that which Congress had deemed unworthy of protection because the state efforts "disturbed the careful balance" which Congress had drawn. *Goldstein v. California*, 412 U.S. 546, 569-70 (1973).

The Williams Act is not merely a disclosure statute, but,

> . . . goes considerably beyond disclosure . . . and requires certain substantive changes in cash tender offer policy. In a sense, these provisions . . . constitute a code of "fair play" in cash tender offers. . . .

Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 274-75 (1969). These substantive provisions provide the offeror and incumbent management of the target company with equal opportunity to present their cases to the shareholders, who will then be able to make a fully informed choice. *Bath Industries, Inc. v. Blot*, 427 F.2d 97 (7th Cir. 1970); *Boyertown Burial Casket Co. v. Amedco, Inc.*, 407 F.Supp. 811 (E.D.Pa. 1976).

The pervasiveness of the federal regulatory scheme over the national securities marketplace, including the regulation of transactions occurring as a result of interstate cash tender offers for securities already traded in the national securities markets, is the result of the necessarily balanced nature of its regulation rather than any sheer bulk of specific regulations. This Court has declared that "just as a state cannot encroach upon the federal . . . law directly, it cannot give protection of a kind that clashes with the objectives of the federal law." *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964).[41]

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[41] Several commentators have concluded that the 1934 Act represents a sufficiently "pervasive" scheme of federal regulations so as to preempt state jurisdiction in the area, including preemption of state take-over acts. *See, e.g.*, Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. at 30 (1976); Note, *Commerce Clause Limitations on State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1164 (1974). Wilner and Landy conclude that although the Williams Act may not, on its face, truly be a "pervasive" scheme to regulate tender offers "since it merely mandates the timing and content of disclosure," because it has been "integrated by Congress into the Securities Exchange Act of 1934, which, in effect, controls every other facet of tender offers," "[t]aken as a whole, that Act is certainly comprehensive."

5.

The Dominant Federal Interest in the Regulation of Interstate Cash Tender Offers Preempts the Idaho Act

Whenever federal law regulates a field in which the federal interest is clearly dominant, the federal system necessarily precludes enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp., supra; Hines v. Davidowitz, supra.* As this Court stated in *Cooley v. Board of Wardens*, 53 U.S. 229, 319 (12 How. 299) (1851):

> Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; *some imperatively demanding a single uniform rule. . . .*
>
> Whatever subjects of this power are in their nature national, or *admit only of one uniform system, or plan of regulation*, may justly be said to be of such a nature as to require exclusive legislation by Congress. (Emphasis supplied).

This Court recently overturned municipal regulation of air travel on the ground that the area "requires a uniform system of federal regulation if the congressional objectives underlying the Federal Aviation Agency Act are to be fulfilled." *City of Burbank v. Lockheed Air Terminal, Inc., supra*, at 639. Similarly, control of interstate tender offers requires a uniform system of national regulation because non-uniform, arbitary protection of incumbent management precludes effective functioning of the national securities markets. *Hearings on Corporate Takeovers Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 101 (1976) (Statement by Richard A. Debs, Federal Reserve Bank, New York). "[T]ender offers are frequently a matter of national concern and the issues they present call

for resolution on a national scale." *Id.* at 91 (Comment of SEC Commissioner Philip Loomis).

Mr. Bartell discussed the proliferation of state takeover statutes (A. 195), and the resulting increase in the potential that a particular tender offer could be subject to more than one such statute. (A. 208). As a result, tender offerors do have to deal with the prospect of a hearing in more than one state and the potential for varying degrees of jurisdiction in more than one state. (A. 210).

The need for a uniform system of regulation under the federal regulatory scheme is exemplified by the situation which actually occurred in this case when state officials of Idaho, New York and Maryland threatened, considered or actually asserted jurisdiction over GWU's proposed interstate cash tender offer. Mr. Wheat himself eloquently made GWU's argument that the state statutes have destroyed uniformity of the regulation of interstate tender offers.

> I believe that it is true that the State statutes, as they presently appear, do in fact have a tendency to deter some tender offers. And part of the reason for that is the — the differences, the kind of mixture of differences in the state statutes and I would therefore applaud the efforts of Mr. Bartell and other State Commissioners to achieve uniformity as a very desirable objective among the state statutes. Such efforts are in progress.

(A. 274).

The lack of uniformity among state schemes of regulation was perceived by Mr. Bartell to create problems relating to the definition of the target company, the specificity of the terms that are used to define the target company, the mandatory hearing requirement, the time limitations that are used and the substantive rights that are provided to tendering shareholders for proration and withdrawal rights. (A. 210

to A. 211). Mr. Bartell was concerned that the time periods which vary between the states are inconsistent so that if a number of states should assert jurisdiction with respect to a particular transaction, the offeror would have a difficult time knowing what to expect as far as a decision is concerned or arranging financing or making other plans in connection with the offer. (A. 201).

In the final analysis, the state having the longest waiting period or allowing the most protracted hearing and review procedures will determine when and whether an interstate cash tender offer is made, irrespective of compliance with the carefully balanced federal regulatory scheme as well as compliance with the statutes of other states asserting extraterritorial jurisdiction. The absolute inability of the Idaho Legislature to effectively regulate tender offers without having a nationwide impact through the extraterritorial application of the Idaho Act further demonstrates the necessity for a single, uniform federal scheme of regulation.[42]

VIII.

THE IDAHO ACT IMPERMISSIBLY BURDENS INTERSTATE COMMERCE

The Idaho Act is unconstitutional under well-established principles based on the Commerce Clause of the United States Constitution. States are prohibited from enacting

[42] In its Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 (17 C.F.R. Part 240), the SEC notes that the proliferation of state "anti-takeover statutes" since 1968 "has resulted in an inconsistent, overlapping and often counter productive pattern of regulation and in many instances may have tipped the carefully construed balance between bidder and subject company envisioned by the Williams Act in favor of the subject company. Accordingly, the Commission believes that a uniformly applied federal regulation would better serve the purposes and policies of the Williams Act, including Interests of investors."

legislation which unduly burdens interstate commerce. The proper test to determine the validity of a state statute affecting interstate commerce was outlined by this Court in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement Co. v. Detroit*, 363 U.S. 440, 443 . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord: Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976).

1.

The Idaho Act Does Not Effectuate a Legitimate Local Public Interest

Whether a state statute achieves a legitimate local public interest will be determined by its substantive and practical effects, rather than a declaration of purpose by the legislature or the motive which compelled its enactment. *Foster-Fountain Packing Company v. Haydel*, 278 U.S. 1, 10 (1928); *Lacoste v. Department of Conservation*, 263 U.S. 545, 553 (1924).

> One challenging the validity of a state enactment on the ground that it is repugnant to the Commerce

> Clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce.

Foster-Fountain, 278 U.S. at 10.

> This Court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form.

Lacoste, 263 U.S. at 550.

As this Court has frequently observed, the Commerce Clause is more than a grant of congressional power. The Clause also provides constitutional sponsorship for the creation and maintenance of interstate markets, where goods and services can move freely and quickly, unimpeded by state borders or other restraints which are imposed by, and not for the sake of, parochial state and local interests. In short, the Commerce Clause, by its own force "create[d] an area of free trade among the several States." *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944) — in effect, a federal "common market." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976).

The "common market" concept and the areas of "free trade" promoted by the Commerce Clause, must, of course, be "free from interference by the States," *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946). Interstate markets for securities are within the area of "free trade" created by the Commerce Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). To this end, the Commerce Clause

erects a constitutional presumption against state regulation of "phases of . . . commerce" that are in their nature intensely "national," *Southern Pacific R. R. Co. v. Arizona*, 325 U.S. 761 (1945), at least where that regulation impedes the "free flow of commerce from state to state". *Id.* at 767. A state's regulation is also of doubtful validity under the Commerce Clause where it necessarily extends far beyond that state's boundaries, since

> To the extent that the burden of state regulation falls on interests outside the state it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

Id. at 767-68 n. 2.

Despite the admonition that no state may "place itself in a position of economic isolation," *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), the Idaho Act erects economic barriers around local target corporations. The true purpose of the Idaho Act is to promote economic protectionism rather than to benefit target company shareholders residing in Idaho. This is evident from the provision of the Idaho Act which exempts from its provisions any offer which is recommended to the stockholders by target company management. § 30-1501(5)(e). Moreover, despite Appellants' urging that shareholder protection is the primary purpose of the Idaho Act, its provisions apply regardless of the absence or presence of any Idaho shareholder. Consequently, Appellants could be in the position of judging whether or not a tender offer could proceed when no stockholder is a resident of the State of Idaho. In fact, that is almost the situation here where nearly 98% of the shareholders of Sunshine resided outside the borders of Idaho. Further, Idaho has little reason to protect shareholders of other states, if

their securities transactions do not take place within Idaho or substantially affect Idaho shareholders.[43]

Mr. Bartell, emphasizing the fact that state takeover acts are really designed to protect local industry and incumbent management, testified that most of such state legislation originated not with the state securities administrators, but "with firms that believe the legislation will be advantageous to them." Mr. Bartell cited the Ohio takeover statute as an example. (A. 197).[44]

The pro-management features of the Idaho Act may actually injure the interests of locally resident shareholders of the target company by delaying, and perhaps eventually defeating, a tender offer for cash at a premium over the existing market price. Sunshine shareholders lost money because of the delays following the Idaho letter and the Order effectively enjoining GWU's proposed interstate cash tender offer.[45] The primary interest of local investors is to sell shares

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[43] *See* Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. at 17 (1976); Note, *Commerce Clause Limitations on State Regulation of Tender Offers*, 47 S. CAL. L. REV. at 1153 (1974). *See also, Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), upholding the constitutionality of state Blue Sky laws against a Commerce Clause attack on the basis that they operated only within the state. The American Law Institute, *Federal Securities Code* (Proposed Official Draft, March 15, 1978) § 1904(c) would preempt state regulation of tender offers, unless the target company has its principal place of business in that state and more than 50% of the target company shareholders holding more than 50% of its securities reside in such state.

[44] *See*, Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 690 (1975) characterizing the Ohio statute as "one of the most glaring examples of special interest legislation." *See also*, Sommer, Jr., *The Ohio Take-Over Act: What Is It?* 21 CASE W. RES. L. REV. 681, 682-83 (1970). It has been nationally reported that the Idaho Act was largely "the brainchild of Morrison-Knudsen Co.," a large Boise-based construction concern. Wall St. J., November 19, 1975, p. 26, col. 2.

[45] *See* note 36, *supra*.

of the target company at the tender price in reliance upon the protection of the federal regulatory scheme. Mr. Wheat testified that a shareholder is principally interested in the price he will receive above the current market price. (A. 268). Federal courts have been mindful of the congressional purpose to protect the rights of *shareholders*:

> While courts should rigorously enforce the policy of honesty and fair dealing prescribed by federal securities legislation, they must guard against the risk that, at the instance of incumbent management, they may be frustrating informed stockholders from doing what the latter want.

Butler Aviation International, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842, 845 (2d Cir. 1970). If any doubt remains as to the true purpose of the state takeover statutes, it is laid to rest by New York Attorney General Lefkowitz, formerly a party to this suit, who has admitted that "enactment of . . . [state takeover] legislation is usually designed to prevent corporations from moving their place of business to another state resulting in the removal of factories and plants, etc. from the state." 354 BNA. SEC. REG. L. REP. A-27 (1976).

> The practical effect and unstated purpose of the state statutes regulating tender offers is to insulate management from attack or take-over by tender offers and thereby protect the business and economic life of the state. Under the *Pike* rationale, this purpose of preserving or insuring local employment is illegal *per se* and is analogous to conferring an advantage on local producers over out-of-state competitors. Where states insulate local management through the regulation of tender offers they are conferring an advantage on local management, which is often inefficient, by protecting them from attack by their out-of-state competitors and thereby insuring them an advantage forbidden by *Pike*.

Note, *Commerce Clause Limitations on State Regulation of Tender Offers*, 47 S. CAL. L. REV. at 1159 (1974). The Idaho Act insulates local target companies by requiring advance notice and providing the means to delay offers. Incumbent management is virtually exempted from state law requirements, and may render state law inapplicable. Under the Idaho Act, the offeror is prohibited from exercising any control, directly or indirectly, over any assets of the target company unless the takeover is made in compliance with the local statute. § 30-1506(6). These tactical advantages given to incumbent management, together with a prohibition against the relocation of target company assets, clearly reflect that the Idaho Act is an attempt to regulate interstate commerce in order to protect local industry and the local economy.

> The Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

Pike v. Bruce Church, Inc., supra, at 145. In *Hood & Sons v. DuMond*, 336 U.S. 525 (1949), a state denied a milk distributor a license to operate an additional plant on the grounds that a proposed expansion of the distributor's facilities would reduce the supply of milk for local markets. This Court, holding that the statute violated the Commerce Clause, stated:

> [T]he measure [is not] supported by health or safety considerations, but solely by protection of local economic interests, such as supply for local consumption and a limitation of competition. This Court unanimously rejected the state's contention in the *Seelig* case and held that the Commerce Clause . . . prohibits such regulation for such ends.

Id. at 531. Mr. Bartell put his finger directly on the fatal constitutional infirmity of the Idaho Act. The takeover statutes "have the effect of, by virtue of their deterrent, a deterrence effect, having the effect to preserving the character of local industry, local companies and maintaining the employment base of the state and economic and social benefits. . . ." (A. 215).

Idaho may not deny permission to make an offer to a tender offeror who seeks a substantial investment in an existing corporation merely to prevent plant relocation. The Idaho Act protects incumbent management, assures continuation of business and jobs and discourages takeover bids which may involve relocation of corporate operations on the pretense of requiring fuller disclosure to the shareholders of target companies.

2.

The Idaho Act Burdens Interstate Commerce

The direct effect of the Idaho Act is to discourage the making and commencement of tender offers. Mr. Boswell testified that "[a]s an investment banker, as a lawyer and as a businessman, I have been involved in several tender offers, and I know that since the passage of the Takeover Statutes, there has been an effect which is to discourage tender offers." (A. 239). He also testified to the detrimental effect of delays which are inherent in the application of the Idaho Act, saying that "the delay materially decreases the likelihood of a successful tender offer in most instances." (May 24, 1977, Trial Tr., p. 190). In addition to decreasing the likelihood of the success of the tender offer, the offering

company is affected by the delay in that its funds which are committed to the offer are frozen as expenses and costs of capital rise ever higher. The Idaho-mandated advance announcement of a tender offer could result in leaks of information which would be extremely disruptive to the securities market and destructive of tender offers. *Senate Hearings* at 72. Another effect on interstate commerce is a change in pricing strategy by the offeror, resulting in "low ball" offers in anticipation of raising the price to secure target management approval and avoidance of the application of the state takeover statutes. (A. 228, Testimony of Mr. Bartell). Mr. Bartell also testified that delay tends to deter tender offers and that the state tender offer statutes still represent a significant deterrent fact. (A. 207).

In this case the Idaho letter requesting GWU to file substantial additional information and the accompanying Order delayed GWU's proposed interstate cash tender offer that otherwise could have gone forward. That action, in the words of the Fifth Circuit, "*stopped* over 31 million dollars of interstate commerce." 557 F.2d at 1284. The Idaho letter created difficulties for GWU in complying with the 1933 Act and the 1934 Act, resulting in a determination by GWU that it might not ever be able to adequately respond to Idaho. (May 23, 1977, Trial Tr., p. 156, Testimony of G. Michael Boswell).

The extraterritorial reach of the Idaho Act had an inherent impact on interstate commerce, as it was purposefully designed to change disclosures which GWU would make in other states and to delay the consummation of securities transactions in other states until the requirements of the Idaho Act were met. Through its extraterritorial application, the Idaho Act, in practical effect, attempted to legislate for the entire nation. *Cf., Southern Pacific R.R. Co. v. Arizona,*

325 U.S. 761, 773-75 (state regulation of train lengths that had the practical effect of regulating the length of out-of-state trains); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) (state restriction on mud guards for trucks and trailers preventing the same vehicle from operating in more than one state ran afoul of the policy of free trade reflected in the Commerce Clause).

Still another effect on interstate commerce is the inconsistency among state takeover statutes. The time periods for administrative clearance are not consistent, nor are the definitions of the jurisdictional base. Advance publication as required in Idaho might have violated a New York prohibition of advance publication, according to Mr. Boswell. (A. 235). The Report of the Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, reprinted in 32 BUS. LAW. 186, 193 (1976), gives the example of a tender offer for shares involving the state takeover statutes of Ohio, Indiana and Delaware, where the hearing procedures in Ohio and Indiana could "collide" with the Delaware requirement that the offer be made not less than 20 nor more than 60 days after delivery of a statement of intent to make the offer.[46]

Conflicts among the statutes cannot be cured by the process of one administrator deferring to an administrator in another state because "in some instances I think there is a question as to whether a state administrator under his or her statute can actually defer to another state." (A. 216, A. 226, Testimony of Mr. Bartell). Undoubtedly, however, such deference is not required in any circumstance. The

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[46] E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra*, at 228, also express the concern that the state takeover statutes may be contradictory.

total lack of uniformity among the state statutes puts the potential offeror constantly at risk, no matter what his course of action may be. As Virginia's Securities Commissioner, Thomas P. Harwood, Jr., observed at the May 9, 1977, seminar of the Association of the Bar of the City of New York in connection with this very tender offer, "There is nothing that disrupts commerce more than not knowing what the rules are."

3.

The Burdens Imposed on Interstate Commerce by the Idaho Act are Clearly Excessive in Relation to the Putative Local Benefits

Even if a state statute advances a legitimate state interest, it nevertheless violates the Commerce Clause if it burdens interstate commerce excessively in relation to the local benefit. *Pike v. Bruce Church, Inc., supra; Bibb v. Navajo Freight Lines, Inc., supra; Southern Pacific R.R. Co. v. Arizona, supra.* This weighing of the national interests and the free flow of commerce against a legitimate state interest requires an analysis of the "nature and extent" of the burdens imposed on interstate commerce by the state statute. There can be no question that trading in securities involves interstate commerce. *See, Freeman v. Hewitt, supra.* Unlike traditional state Blue Sky laws, the Idaho Act is not limited to intrastate transactions. It would purport to apply even if no shareholder resided in Idaho, and even though the interstate cash tender offer was made exclusively out-of-state for the equity securities of any target company covered. For example, the Idaho Act would purport to prevent GWU from purchasing the securities of a Washington corporation owned by a shareholder in Florida because of Sunshine's contacts in Idaho. In *Baldwin v. G. A. F. Seelig, Inc., supra,* this Court held invalid a New York statute with a similar

extraterritorial reach. The statute in that case prohibited the sale of imported milk in New York unless the price paid to the producer in the state of origin was at least equal to the minimum price prescribed in New York. This Court noted that New York could not "project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521. This indirect regulation by one state of the price to be paid in another state violated the Commerce Clause:

> One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or even failing to maintain them properly the legislature of Vermont, and not that of New York, must supply the fitting remedy.

Id. at 524.

The Idaho Act attempts to control conduct outside of Idaho more than the statute in *Baldwin* because it could be used to prohibit an interstate cash tender offer in every other state, even though such other states may have an equal or greater contact with the target company, but may choose not to enact takeover legislation. Idaho, thus, seeks to impose legislative judgment upon other states and their shareholders as well as upon foreign corporations. This direct burden on interstate commerce is hardly outweighed by the minimal protection the Idaho Act gives to Idaho shareholders.

Any protection to Idaho shareholders afforded by the Idaho Act is far from certain. Any desire to make a cash tender offer for shares held by Idaho residents may be deterred by the very presence of the Idaho Act. The proposed tender offer, once announced, may be withdrawn as the tender offeror becomes discouraged with attempts to com-

ply with the Idaho Act's pre-effective filing, hearing and disclosure requirements. The announced offer may purposefully be set at a price lower than the tender offeror is really willing to pay, so that any advantage to Idaho shareholders is illusory. Because of delays experienced and costs incurred, the tender offeror may actually lower the original price. Substantial disclosure requirements may be of little use to a shareholder making an economic judgment whether to tender shares for cash at a premium. If anything, target management should be required to make additional disclosures since it is more likely to possess current information about the current value of target company shares.

Appellants argue that the Idaho Act encourages civic responsibilities by offering protection to local industry, but the same protection is afforded irresponsible target management. Idaho can encourage good corporate citizenship in other ways which have a far less substantial impact on interstate commerce, such as through tax incentives and civic programs in which local corporate leaders could participate. In short, the burdens on interstate commerce imposed by the Idaho Act are disproportionate to any legitimate benefits provided, and the Idaho Act is invalid under the Commerce Clause. *Accord*: E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra*, at 229-31.

Appellants' reliance upon *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R. Co.*, 393 U.S. 129 (1968), is misplaced. In *Brotherhood*, which dealt with the constitutionality of the Arkansas "full crew" statute regulating the size of train crews in the State of Arkansas, this Court recognized that "Congress was aware of state full-crew laws and did not intend to override them." 393 U.S. at 134. However, enactment of the Williams Act preceded the recent proliferation of state takeover statutes, including the Idaho Act. The *Brotherhood* decision also recognized the issue of safety as a legitimate local concern. Idaho's regulation of an interstate commercial transaction is of an entirely different nature. This Court also concluded that an "insignificant" problem was created by requiring a train to stop at the Arkansas state line to pick up an additional crew member. Hardly the same problem is presented when an interstate commercial transaction can proceed in no state, even if no shareholders reside in Idaho, until the Idaho statute is satisfied. This Court in *Brotherhood* observed that the full-crew statutes "had no effects outside the state beyond those of picking up and setting down the extra employee at the state boundaries. . . ." 393 U.S. at 139. The record here clearly reflects the extra-territorial impact of the Idaho Act.

Appellants assert that Idaho regulatory authority resembles the conduct of proxy contests for corporate control, and the Idaho Act may be justified on the state's interests in regulating the internal corporate affairs of Sunshine. There are distinct differences between a proxy contest, in which shareholders transfer only voting power, and interstate cash tender offers, where internal corporate procedures are not involved as an outsider purchases outstanding securities. Further, Washington law governs the internal affairs of Sunshine, not Idaho law. Can it be said that in the incipient stages of GWU's plans Idaho, Maryland and New York had the right to regulate the internal affairs of a target company incorporated in Washington? Obviously, conflicts will certainly occur where several states attempt to assert jurisdiction over the internal affairs of one corporation.[47]

The Courts below correctly decided that the Idaho Act is invalid under the Commerce Clause.

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[47] See, Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 FORDHAM L. REV. at 16-18 (1976).

IX.

GWU HAS STANDING TO CHALLENGE THE ENFORCEABILITY AND CONSTITUTIONALITY OF THE IDAHO ACT

The District Court correctly framed the standing issue in terms of "injury in fact" (a concrete interest in the outcome of the suit, sufficient to render the matter a case or controversy subject to a federal court's jurisdiction under Article III of the Constitution of the United States), and in terms of whether GWU is a proper proponent of the legal rights it seeks to enforce by being within the "zone of interests" sought to be protected. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

After having made a substantial investment in the stock of Sunshine, GWU filed its Schedule 13D with the SEC and announced and was prepared to go forward with an interstate cash tender offer to purchase up to an additional 2,000,000 shares of Sunshine stock at $15.75 per share. The proposed offer was effectively enjoined anywhere in the world by the enforcement action taken by Idaho officials pursuant to the Idaho Act and GWU, for itself, brought an action for a declaration that the Idaho Act represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause, intruded unwarrantedly into a field preempted by federal regulation, contravened the Supremacy Clause, and denied to GWU other rights, privileges and immunities under the Constitution. GWU also sought for itself an injunction to redress these wrongs by restraining the operation and enforcement of the Idaho Act. GWU clearly demonstrated that the challenged action of the Idaho defendants had caused it economic injury in fact, as it was GWU's tender offer which was significantly jeopardized and

GWU's capital which was frozen by reason of the enforcement of the allegedly unenforceable and unconstitutional state law. GWU clearly invoked the District Court's jurisdiction by showing that it had suffered "some threatened or actual injury resulting from the putatively illegal action. . . ." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citations omitted).

GWU did not assert a "generalized grievance" and did not rest its claim for relief on the legal rights or interests of third parties. *Id.* at 499. The litigation was not of a "hypothetical or abstract character," *Flast v. Cohen*, 392 U.S. 83, 100 (1968). GWU alleged that it had sustained or was in immediate danger of sustaining some direct injury "as the result of [the statute's] enforcement. . . ." *Cramp v. Board of Public Instruction*, 568 U.S. 278, 283 (1961).

Having complied in all respects with the requirements of federal law, GWU was uniquely within the "zone of interests" intended to be protected because the challenged state law is preempted and imposes an impermissible burden on interstate commerce. Inasmuch as the Idaho Legislature, through the enactment of a state takeover statute having a nationwide impact, acted in disregard of the command of federal law which regulates cash tender offers nationwide, GWU was certainly within the class of persons that the federal law was designed to protect. *Data Processing Service Organizations v. Camp*, *supra*, at 155.

As the District Court held, this Court's decision in *Piper v. Chris-Craft Industries, Inc.*, *supra*, does not compel a contrary result. GWU was not asserting the existence of any implied cause of action under the Williams Act. GWU was not seeking damages against the target company or anyone

else. To the extent that *Piper* could have any relevance at all to the issue of standing to assert the unconstitutionality and unenforceability of a state takeover statute, this Court specifically withheld judgment on the standing of a tender offeror to sue for relief other than damages. *Piper* at 42. And the congressional policy of evenhandedness in the regulation of tender offeror and target management under the Williams Act is probative of its intent to grant standing to tender offerors and target management for declaratory and injunctive relief under the Williams Act.

Finally, GWU did not assert any action under § 10(b) of the 1934 Act or Rule 10b-5 promulgated thereunder, and this Court's decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), relied upon by Appellants, is inapposite.

X.

WAYNE L. KIDWELL (NOW DAVID H. LEROY) SHOULD BE DISMISSED AS A PARTY APPELLANT

Wayne L. Kidwell, Attorney General of Idaho, was a party to the proceedings before the District Court, but did not choose to appeal from the judgment of the District Court. The only Appellant in this case before the Fifth Circuit was Tom D. McEldowney, Director of the Idaho Department of Finance. Since Wayne L. Kidwell (now David H. Leroy) was not a party to the proceeding in the court from whose judgment this appeal is sought, he is not a proper party to any proceeding before this Court. U. S. Supreme Court Rule 10. GWU timely filed a motion to dismiss the Idaho Attorney General as a party Appellant pursuant to that Rule.

CONCLUSION

The judgments below by both the District Court and the Fifth Circuit should be affirmed for the reasons stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Twenty-five (25) copies, as requested, of the foregoing Brief of Appellee were mailed, first-class air mail, postage prepaid, on this the 27th day of March, 1979, to the following counsel of record for the Appellants:

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